

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

4 Adv. Case No. 19-08262-rdd

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6 In the Matter of:

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8 SEARS HOLDINGS CORPORATION,

9

10 Debtor.

11 - - - - - x

12 TRANSFORM HOLDCO LLC,

13 Plaintiff,

14 v.

15 SEARS HOLDINGS CORPORATION et al.,

16 Defendants.

17 - - - - - x

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1 United States Bankruptcy Court  
2 300 Quarropas Street, Room 248  
3 White Plains, NY 10601  
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5 July 11, 2019

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12 B E F O R E :

13 HON ROBERT D. DRAIN

14 U.S. BANKRUPTCY JUDGE  
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16 ECRO: NAROTAM RAI  
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1 HEARING re Notice of Agenda of Matters Scheduled for Hearing  
2 on July 11, 2019 at 10:00 a.m.

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4 HEARING re Notice of Assumption and Assignment of Additional  
5 Designatable Leases (ECF #3298)

6

7 HEARING re MOAC Mall Holdings LLC's Second Supplemental and  
8 Amended Objections (ECF #3501)

9

10 HEARING re MOAC Mall Holdings LLC's Third Supplemental and  
11 Amended Objections (ECF #3926)

12

13 HEARING re MOAC Mall Holdings LLC's Fourth Supplemental and  
14 Amended Objections (ECF #4450)

15 Transform Holdco LLC's Reply (ECF #4454)

16

17 HEARING re Motion to Exceed Page Limit for Transform Holdco  
18 LLC's Reply to MOAC Mall Holdings LLC's Objections to  
19 Assumption and Assignment (ECF #4455)

20

21 HEARING re Application of Team Worldwide Corporation, a  
22 Creditor, for Entry of an Order Pursuant To Rule 2004 of The  
23 Federal Rules of Bankruptcy Procedure Requiring the  
24 Production of Documents by and an Examination of the Debtors  
25 (ECF #4346) Debtors' Objection (ECF #4429)

1 HEARING re Debtors' Supplemental Motion to Enforce the Asset  
2 Purchase Agreement (ECF #4029)

3

4 HEARING re Adversary proceeding: 19-08262-rdd Transform  
5 Holdco LLC v. Sears Holdings Corporation et al Pre-trial  
6 Conference

7 Debtors' Brief In Opposition (ECF #4430)

8

9 HEARING re Joinder of the Official Committee of Unsecured  
10 Creditors to Debtors' Supplement Motion to Enforce the Asset  
11 Purchase Agreement and Debtors' Brief in Opposition  
12 (ECF #4436)

13 Transform Holdco LLC's Brief (ECF #4464)

14 Transform Holdco LLC's Reply (ECF #4480)

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2

3 CLEARY GOTTlieb STEEN & HAMILTON LLP

4 Attorneys for Transform Holdco LLC

5 One Liberty Plaza

6 New York, NY 10006

7

8 BY: ANDREW WEAVER

9 SAMUEL LEVANDER

10 PASCALE BIBI

11 LEWIS J. LIMAN

12 MARGOT G. MOONEY

13 ABENA MAINOO

14 SEAN A. O'NEAL

15 LUKE A. BAREFOOT

16

17 AKIN GUMP STRAUSS HAUSER & FELD LLP

18 Attorneys for Unsecured Creditors' Committee

19 One Bryant Park

20 New York, NY 10036

21

22 BY: SARA L. BRAUNER

23 PHIL DUBLIN

24 IRA DIZENGOFF

25 JOSEPH SORKIN

1 WEIL, GOTSHAL & MANGES LLP

2 Attorneys for Sears Holdings Corp. and its Affiliates

3 767 Fifth Avenue

4 New York, NY 10153

5  
6 BY: JACQUELINE MARCUS

7 PAUL R. GENENDER

8  
9 SEYFARTH SHAW

10 Attorneys for Wilmington Trust Association, as

11 Indenture Trustee and Collateral Agent

12 620 8th Avenue

13 New York, NY 10018

14  
15 BY: EDWARD M. FOX

16  
17 VEDDER PRICE

18 Attorneys for Village of Hoffman Estates

19 1633 Broadway, 31st Floor

20 New York, NY 10019

21  
22 BY: MICHAEL L. SCHEIN

1 PATTERSON BELKNAP WEBB & TYLER LP

2 Attorneys for MOAC Mall Holdings

3 1133 Avenue of the Americas

4 New York, NY 10036

5

6 BY: DAVID W. DYKHOUSE

7

8 DLA PIPER LLP (US)

9 Attorneys for Transform Holdco

10 1251 Avenue of the Americas

11 New York, NY 10020

12

13 BY: RACHEL EHRLICH ALBANESE

14 RICHARD A. CHESLEY

15

16 DIAMOND MCCARTHY LLP

17 Attorneys for Team Worldwide Corporation

18 Two Houston Center

19 909 Fannin Street, 37th Floor

20 Houston, TX 77010

21

22 BY: CHARLES M. RUBIO

23

24

25

1 M-III PARTNERS, LP

2 Attorneys for the Debtors

3 130 West 42nd Street, 17th Floor

4 New York, NY 10036

5

6 BY: WILLIAM GALLAGHER

7

8 WITNESSES:

9

10 KUNAL S. KUNDANI

11 JANE S. BORDEN

12 WILLIAM GALLAGHER

13 NADER TAVAKOLI

14 ANDREW HEDE

15 CHRISTOPHER GOOD

16

17

18

19

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1 P R O C E E D I N G S

2 THE COURT: Please be seated. Okay, good morning.  
3 In Re Sears Holdings Corporation, et al.

4 MR. SCHROCK: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. SCHROCK: Ray Schrock, Weil, Gotshal for the  
7 Debtors. We have a number of items on the agenda today. I  
8 think the first part of the agenda should be pretty quick,  
9 and then we have the APA dispute, which I think will take  
10 the majority of the hearing.

11 THE COURT: Okay. Can I interrupt you just for a  
12 second?

13 MR. SCHROCK: Oh, of course.

14 THE COURT: Sorry, go ahead.

15 MR. SCHROCK: No worries. One quick announcement  
16 just for the Court and parties-in-interest. We have begun  
17 soliciting votes on Sears' plan of liquidation; that began  
18 last Friday. We've also filed just a slightly modified  
19 version of the plan with just a couple of clarifying changes  
20 that were requested. That will not impact solicitation  
21 because the way we are soliciting, people are clicking on  
22 the, you know, to get the documents; they're not getting  
23 paper versions, and it just goes to the amended plan, but  
24 it's just a couple of clarifying changes on Kmart guaranty  
25 claims.

1 THE COURT: Okay.

2 MR. SCHROCK: With that, Your Honor, absent any  
3 questions, I can turn it over to Miss Marcus for the first  
4 item.

5 THE COURT: No, that's fine. Why don't we just  
6 file the agenda.

7 MR. SCHROCK: Okay.

8 MS. MARCUS: Good morning, Your Honor. Jacqueline  
9 Marcus, Weil, Gotshal & Manges, on behalf of Sears Holdings  
10 Corporation, it's affiliated Debtors.

11 THE COURT: Good morning.

12 MS. MARCUS: The first item is a status conference  
13 regarding the notice of assumption and assignment, and  
14 that's going to be handled by Mr. Barefoot from Cleary.

15 THE COURT: Okay.

16 MR. CHESLEY: Your Honor, Richard Chesley, DLA, on  
17 behalf of Transform, Your Honor.

18 THE COURT: Good morning.

19 MR. CHESLEY: We'll be very brief. We are here on  
20 the status conference. Mr. Flynn is here on behalf of the  
21 Mall of America. The motion has been fully briefed before  
22 the Court. Parties have, however, have now begun to have  
23 some settlement negotiations, and we are hopeful of  
24 furthering those in the next week to 10 days.

25 We have spoken to the Court's chambers, who has

1 graciously told us if we're not able to get this resolved,  
2 we could have this heard on August 22nd. Our plan is to try  
3 to get this resolved so we do not see you on August 22nd,  
4 and we would put a stipulation before the Court confirming  
5 these dates and extending the 365(d)(4) deadline.

6 THE COURT: Okay. So the parties have agreed to  
7 extend the date to assume or reject --

8 MR. CHESLEY: Yes, Your Honor.

9 THE COURT: -- to comply with that schedule. One  
10 other thing I think I have to say on this, unless someone  
11 from Mall of America wants to say anything is, I guess it's  
12 conceivable that you could resolve most, but not all.

13 If that's the case, as soon as you know that,  
14 there's still an open issue or two, let me know so that  
15 we're not preparing on the whole thing. Because, you know,  
16 obviously, a number of different (indiscernible) have  
17 objections that the parties have been dealing with. They've  
18 been narrowing them down, I can tell from the supplemental  
19 briefing. Hopefully, you'll resolve the whole thing.

20 MR. CHESLEY: We will, Your Honor. To the extent  
21 we do have isolated issues, we'll apprise the Court  
22 immediately.

23 THE COURT: Okay.

24 MR. CHESLEY: Thank you, Your Honor.

25 THE COURT: Thanks.

1 MR. CHESLEY: And may we be excused, Your Honor?

2 THE COURT: Yes.

3 MR. CHESLEY: Thank you.

4 MR. BAREFOOT: Good morning, Your Honor. Luke  
5 Barefoot from Cleary Gottlieb Steen & Hamilton for Transform  
6 Holdco and its affiliates. Your Honor, we have a few other  
7 lease assignment related matters. Your Honor, just to set  
8 the stage, you may recall that at the May 8th hearing, we  
9 left with approximately 50 lease -- leases from  
10 approximately 50 store locations where the 365(d)(4)  
11 deadline was adjourned, and that was pundit for subsequent  
12 resolution.

13 Since that time, we've had 21 lease locations that  
14 have been successfully assumed and assigned with the  
15 objections resolved. And today, I have leases for five more  
16 locations where we have resolved objections: first, for  
17 Lansing, Michigan -- store 1170; the warehouse location in  
18 Ontario, California -- store 8629; Brooklyn, New York --  
19 store 1114; and then the two locations in Manhattan at Penn  
20 Station and Astor Place -- stores 7749 and 7777.

21 We have resolved all the objections with the  
22 landlords for those locations, and we have revised forms of  
23 orders. I'm happy to hand them up or we can just submit  
24 them to your chambers.

25 THE COURT: No. You should email them to chambers

1 like you've been doing.

2 MR. BAREFOOT: We'll do that, Your Honor. That  
3 means there are approximately 26 remaining locations.  
4 That's a little bit misleading because 16 of those are at a  
5 single master lease with a single landlord. We're  
6 continuing to try to work through those, as many as  
7 consensually as we can. Some of those do present bespoke  
8 issues where we already have a briefing schedule and will be  
9 before Your Honor on those in the next two months.

10 THE COURT: Okay.

11 MR. BAREFOOT: But we're hoping that we can  
12 resolve as many of those and submit them on notice of  
13 presentment.

14 THE COURT: Okay, that's fine.

15 MR. BAREFOOT: Thank you, Your Honor.

16 THE COURT: Thanks for the update.

17 MS. MARCUS: Your Honor, the next matter on the  
18 agenda is listed as an uncontested matter. It's No. 2. I  
19 don't think you need to do anything with respect to that.  
20 It's related to the page limit.

21 THE COURT: If Transform wants to submit a longer  
22 brief, it can do that. You can submit the order for that.

23 MR. BAREFOOT: Thank you, Your Honor.

24 THE COURT: Although you know what Mark Twain  
25 said, right? "If I had more time, this would be shorter."

1 MS. MARCUS: Turning to the contested matters,  
2 Your Honor. The next matter is the application of Team  
3 Worldwide for a Rule 2004 order.

4 THE COURT: Right.

5 MR. RUBIO: Good morning, Your Honor. Charles  
6 Rubio on behalf of Team Worldwide. Team Worldwide is a  
7 company that designs and manufactures products, including  
8 inflatable mattresses. Team Worldwide owns U.S. patents,  
9 and Team Worldwide has patent infringement claims against  
10 certain of the Sears Debtors.

11 Team Worldwide has previously commenced a lawsuit  
12 against Walmart for similar claims. And during that Walmart  
13 litigation, the manufacturers of these products intervened  
14 on the basis that they had agreements with Walmart that  
15 provided that they would indemnify Walmart against patent  
16 infringement claims brought against them. They also noted  
17 in that litigation that they had similar agreements with  
18 other U.S. retailers.

19 Just after the Debtors filed their Chapter 11  
20 plan, we contacted the Debtors to obtain copies of those  
21 agreements. We note that in Schedule G of the Sears,  
22 Roebuck -- the Sears, Roebuck Holdings company schedules,  
23 they actually have two of these manufacturers listed in  
24 them.

25 So we contacted them in order to obtain these to

1 determine what the indemnification claims are. We don't  
2 know things like if there are separate purchase orders that  
3 are each individual contract, if these are executory  
4 contracts. We don't know if the indemnification provisions  
5 include cost of defense. So there's a lot of provisions  
6 that we don't know what would necessarily be included in  
7 there, so we reached out to the Debtor soon after they filed  
8 their plan in order to obtain copies of them.

9 We had been in discussions with the Debtors. But  
10 in light of the upcoming deadline of the confirmation  
11 hearing and being that we haven't received any documents  
12 from the Debtors, we decided to formalize the discovery  
13 request and bring it before the Court so we can have it  
14 formalized and have a process here in order to actually get  
15 documents and not waive our rights before that.

16 The reason why this is critical is that, under the  
17 current plan, the indemnification rights appear to be lost.  
18 So how it works is that there's a discharge --

19 THE COURT: Can you walk me through that? Your  
20 motion actually didn't cite any language to support that  
21 contention.

22 MR. RUBIO: Yeah. So there's a discharge of all  
23 claims under the plan. So I guess this is pretty typical,  
24 even though this is a liquidating plan; whether the  
25 discharge is permissible, that's another issue. But under

1 this plan, if there's a discharge, then how it would work is  
2 that we would have direct claims against Sears, and then  
3 Sears would then have a back-to-back claim under the  
4 indemnification agreement. So having a discharge of our  
5 claim against Sears would then prevent the back-to-back  
6 claim, which would effectively discharge the parties  
7 indemnifying Sears for these claims.

8 THE COURT: Okay. Well, the -- but you want this  
9 information to sue these people directly? I don't  
10 understand why -- I'm still having a hard time understanding  
11 why you're seeking this information, other than to sue these  
12 manufacturers directly for infringing on the patent.

13 MR. RUBIO: We're proposing a modification to the  
14 plan to provide a route, so that these indemnification  
15 claims are preserved, and we don't have to bring -- collect  
16 against our general unsecured claims and our item claims  
17 against the Debtors. But rather, again, we provided an  
18 alternative here that basically it provides an assignment of  
19 these indemnification rights to Team Worldwide so that Team  
20 Worldwide, in Sears' shoes, can then pursue these claims and  
21 that they're preserved, and we don't have to collect against  
22 the estates.

23 THE COURT: Right. But that may be a valid  
24 solution to your issue, but I don't understand the basis for  
25 the discovery here. I mean, it seems to me that what you're



1 doing is you're using 2004 to take discovery really aimed at  
2 a third party based on just what the Debtors' relationships  
3 with that third party.

4 MR. RUBIO: These are contract.

5 THE COURT: And that's an overreach.

6 MR. RUBIO: So these are contracts between the  
7 Debtors and the manufacturers whereby the manufacturer --

8 THE COURT: Yeah, I understand. But the purpose  
9 of it is not -- it doesn't seem to be covered by Rule 2004.  
10 The aim is really to get information about the manufacturers  
11 so that you could pursue claims against them.

12 MR. RUBIO: And the objection --

13 THE COURT: Why is that -- why should the Debtor  
14 be concerned about that?

15 MR. RUBIO: So as part of the Debtors' estates,  
16 the estates would include these indemnification rights and  
17 these are valuable rights of the estates, which would offset  
18 administrative expense claims and general unsecured claims  
19 that are being asserted, or that will be asserted in the  
20 case of the administration claim against the Debtor. So  
21 these indemnification claims are valuable for rights of the  
22 Debtors' estates.

23 THE COURT: Right. Well, if that's the case, the  
24 Debtors can pursue them.

25 MR. RUBIO: So what we're saying is that if we go

1 to confirmation and we raise the issue that, hey, they're  
2 effectively discharging our claim and they have these  
3 indemnification rights that they would be able to recover  
4 and pay us on account of these claims. But by discharging  
5 it, we're not able to pursue them, in which case, they're  
6 not able to -- or they wouldn't then invoke their  
7 indemnification rights. They're effectively cutting off our  
8 ability to ultimately recover against the indemnifying  
9 manufacturers.

10 So this is really a property of the estate issue,  
11 because these indemnification claims are property and rights  
12 of the Debtors' bankruptcy estates, and we just don't have  
13 that information. So what we would be -- we'd be put in a  
14 situation where we'd be making an objection at the  
15 confirmation hearing without having the actual evidence of  
16 the indemn- --

17 THE COURT: Well, so you take discovery under 9014  
18 and the Part VII rules incorporated in 9014 as part of the  
19 confirmation hearing.

20 MR. RUBIO: So we note in our application that if  
21 the Court determines that 2004 is an improper basis that we  
22 have been using, the contested procedures and the case  
23 management procedures order. So really, we're viewing this  
24 as a form of re-substance here. I mean, at the end of the  
25 day, we're asking for copies of these certain agreements.

1 And we provided a list of 38 manufacturers to facilitate the  
2 Debtors' review and be able to identify them; also, two of  
3 them are listed on Schedule G.

4 THE COURT: Is that all you're seeking, just the  
5 contracts with the vendors?

6 MR. RUBIO: That is what we started with. And so,  
7 Your Honor, let me clarify this. I'm of the approach that  
8 you do all your discovery when you need to do it, so you  
9 don't try to do it piecemeal. So, yes, we would be  
10 satisfied with that information because that's the initial  
11 information that we asked for.

12 When we filed our 2004, we took a broader brush  
13 because we don't know if we're going to have follow-up  
14 questions or anything like that. But if you want us to take  
15 it piecemeal and just ask for any contracts with those 30  
16 manufacturers, we're fine with that. But we would want to  
17 reserve our rights in the event that there's additional  
18 information that we need to explain that, that we would need  
19 that follow-up information. But initially, yes, that is all  
20 we asked for the Debtors was to look for the 38 manufacturer  
21 contracts.

22 THE COURT: In any event, that's what you're  
23 asking for at this point.

24 MR. RUBIO: I will limit the request to that at  
25 this point.

1 THE COURT: Okay. All right.

2 MS. MARCUS: Jacqueline Marcus again, Your Honor,  
3 for the Debtors. Your Honor, I think you hit the nail on  
4 the head with your comments. This Rule 2004 request, as far  
5 as we can tell, is a request for information that will  
6 solely benefit Team Worldwide, and in particular in  
7 connection with litigation that they are pursuing or want to  
8 pursue against the manufacturers.

9 I'll note that they already have litigation that  
10 was filed just a couple of months ago against nine other  
11 retailers. And it seems to us that they're taking advantage  
12 of the fortuity of the Sears bankruptcy to try to get  
13 information that they're really not entitled to and that  
14 they, as you noted, is inconsistent with the purpose of Rule  
15 2004.

16 We don't know if the supply agreements that Team  
17 Worldwide is asking for even exist, and we don't know  
18 whether they have the indemnification language that  
19 apparently was in the Walmart agreements.

20 As Your Honor knows, the Debtors are laboring with  
21 very few -- I think we have 26 -- employees left;  
22 substantially, all of our employees have been transferred to  
23 Transform. And we are very busy preparing for all of the  
24 tasks associated with confirmation of the plan.

25 I'll also note, Your Honor, that the idea that

1 somehow our indemnifica- -- the Debtors' indemnification  
2 rights are jeopardized under the plan, I don't see it. I  
3 don't know where that comes from.

4 THE COURT: IAU would still have -- the Debtors  
5 would have the right to indemnification; it's just that it  
6 would be limited to, I guess, the amount that you'd be  
7 paying as part of a claim recovery to Team Worldwide.

8 MS. MARCUS: Right. And the plan -- you know, the  
9 idea that the plan needs to be modified, we don't see it.  
10 There are references to third-party releases, there are no  
11 not consensual third-party releases, and these vendors are  
12 not within the definition of released parties in any event,  
13 in addition to the fact that that's a confirmation issue  
14 rather than an issue for today.

15 THE COURT: Well, are the Debtors searching for  
16 this -- I mean, how can -- how would the Debtors go about  
17 searching, now that we know it's limited to the 38 vendors?

18 MS. MARCUS: Which it wasn't, Your Honor.

19 THE COURT: I understand.

20 MS. MARCUS: The request for a lot more than that.

21 THE COURT: I understand.

22 MS. MARCUS: We have asked the Debtors, the  
23 employees who are now working for Transform. They did some  
24 initial work. They weren't able to find anything.

25 THE COURT: Well, let me just stop you right

1 there. Is this information within the Debtors' control or  
2 is it within Transform's control?

3 MS. MARCUS: It's within Transform's control.

4 THE COURT: Does the -- other than good will, do  
5 the Debtors have the ability to direct Transform to find  
6 these contracts?

7 MS. MARCUS: There is a transition services  
8 agreement that allows us to make certain requests of  
9 Transform and we pay for that, of course.

10 THE COURT: Okay, right.

11 MS. MARCUS: But it's not as easy as simply  
12 pushing a button. And the fact that there are two entries  
13 of Schedule G may just mean that there were purchase orders  
14 with those entities, not the kind of supply agreements to  
15 which Team Worldwide is alluding.

16 THE COURT: Right. But as far as burdensomeness  
17 is concerned, you can make the request to Transform for the  
18 -- if there are any vendor agreements, not purchase orders,  
19 but vendor agreements for these 38 listed parties; then they  
20 would go look for it on the computer system?

21 MS. MARCUS: We have everybody here, so if  
22 theoretically, you know, we could make that request and we  
23 have made the request, in fact.

24 THE COURT: Right. And potentially, that would be  
25 beneficial to the Debtors because then you'd know whether

1 the Debtors would have rights against these entities.

2 MS. MARCUS: Sure. I mean, as part of the  
3 confirmation process, we're going to be looking at any  
4 executory contracts and determining which ones need to be  
5 assumed because, otherwise, they're going to be rejected  
6 under the plan.

7 THE COURT: Okay. There's no suggestion that  
8 there's any confidentiality restrictions on this with the  
9 vendors, right?

10 MS. MARCUS: Not having seen the agreements.

11 THE COURT: Not that you know of. So, obviously,  
12 that would. Did you give notice to the vendors of your  
13 motion?

14 MR. RUBIO: Of the 2004, Your Honor?

15 THE COURT: Yeah.

16 MR. RUBIO: No, not up to this point.

17 THE COURT: Okay.

18 MR. RUBIO: Unless they're otherwise provided.

19 THE COURT: All right.

20 MS. MARCUS: And, Your Honor, I also note that  
21 Team Worldwide has filed a stay relief motion, which will be  
22 on on August 22nd.

23 THE COURT: Right.

24 MS. MARCUS: And, again, you know, the pending  
25 proceeding rule that you can't proceed by 2004 when you have

1 a contested matter should also preclude the entry of the  
2 order that they're seeking here.

3 THE COURT: When's that on; it's on for July what?

4 MS. MARCUS: I believe it's on for the next  
5 omnibus hearing, which is August 22nd.

6 THE COURT: August, okay. Well, that's to be able  
7 to pursue the patent infringement litigation in District  
8 Court; that's the basis for the claim, right?

9 MS. MARCUS: To name Sears as a defendant, as well  
10 as, I believe, the vendors or the alleged vendors.

11 THE COURT: But is it to pursue the litigation or  
12 just to name them as a nominal defendant?

13 MR. RUBIO: It's to name them as a nominal  
14 defendant, Your Honor. Again, like in the Walmart  
15 litigation, we named Walmart, and then the manufacturers  
16 intervened on their behalf on the basis of these  
17 indemnification provisions.

18 THE COURT: I'm not intending to argue this now.

19 MR. RUBIO: Sure.

20 THE COURT: I just want to understand how the  
21 pending proceeding rule would apply. It doesn't sound like  
22 it does. I mean, they're just basically, from what I'm  
23 being told today, they just want to name Sears but not  
24 pursue it just to have it in the caption, but their claim  
25 against Sears would be liquidated in the bankruptcy case.



1 Is that how the motion is couched?

2 MR. RUBIO: What we're proposing is that if we  
3 could pursue this, then we will not collect our claim  
4 against Sears in the bankruptcy estate. We would  
5 exclusively --

6 THE COURT: When you say pursue this, what do you  
7 mean, the discovery or the lift stay?

8 MR. RUBIO: Oh, I'm sorry, the liquidation of the  
9 claim in the bankruptcy case. We would not pursue the  
10 liquidation of the claim in the bankruptcy case; we would  
11 liquidate that claim in the District Court.

12 THE COURT: Oh, well, that's not going to work.

13 MR. RUBIO: Okay.

14 THE COURT: I can tell you right now, that's not  
15 going to work. You file the claim here.

16 MR. RUBIO: Understood. So as part of this, we're  
17 saying that we're not going to collect on the claim. We're  
18 seeing it similar to when someone has coverage by an  
19 insurance policy, an insurance company would indemnify.  
20 You could -- we're not collecting against --

21 THE COURT: So you can waive the claim, except in  
22 respect of indemnity?

23 MR. RUBIO: I want to be very careful here, is  
24 that we're not saying -- we're saying we're going to waive  
25 collection of the claim.

1 THE COURT: Right.

2 MR. RUBIO: Okay, okay.

3 THE COURT: Except to the extent you can --  
4 waiving collection, except through indemnification.

5 MR. RUBIO: Correct, Your Honor.

6 THE COURT: All right.

7 MR. RUBIO: That would be the proposal.

8 THE COURT: All right.

9 MS. MARCUS: Your Honor, the pending proceeding to  
10 which I was referring was the contested matter on the  
11 automatic stay.

12 THE COURT: Right.

13 MS. MARCUS: As opposed to the --

14 THE COURT: It doesn't sound like this discovery  
15 really affects that. It might have before when there was a  
16 lot of other relationship with vendor documents being sought  
17 or documents relating to relationships with the vendors  
18 being sought. But if it's just these -- whether they're  
19 vendor agreements with these 38, it doesn't sound like it  
20 would be worth.

21 And in any event, the representation is that Team  
22 Worldwide Corporation is not pursuing any monetary recovery  
23 directly from the Debtor. So in that sense and consistent  
24 with that agreement, it seems that (a) this would be covered  
25 by the broad language of 2004, since it a matter that

1 affects the administration of the Debtors' estate; in other  
2 words, the quid pro quo for Team Holdco's agreement not to  
3 seek recovery except through indemnification is, the Debtor  
4 trying to make these contracts available to it.

5 And it also appears that, as far as the balancing  
6 of the burden and the good cause showing, which the case law  
7 requires, now that it's been clarified, it doesn't sound  
8 like it's that much of a burden to the Debtors.

9 MS. MARCUS: The time period for the proposed  
10 order --

11 THE COURT: The time period doesn't make sense. I  
12 think that's something that you're going to have to work out  
13 with Holdco. But I -- you don't need that; you've already  
14 worked out the deal. It's on the record today with regard  
15 to your plan objection.

16 MR. RUBIO: The assumption is that these  
17 indemnification rights exist. But, I mean, as long as they  
18 exist, that's the deal we've proposed to the Debtors  
19 already.

20 THE COURT: Right. So it doesn't really affect  
21 the timing of the objection to the plan.

22 MR. RUBIO: So there's some modifications --

23 THE COURT: To the extent they exist, they exist;  
24 and if they don't, they don't. And either way, the  
25 objection is moot because it's resolved by what's been laid

1 on the record.

2 MR. RUBIO: Right. So if there's no  
3 indemnification rights, we would continue with our claim;  
4 but if there were indemnification rights, we would do the --

5 THE COURT: Well, that's not what you just told  
6 me.

7 MR. RUBIO: Well, I'm not intending to wai- --  
8 again, this is -- I'm not intending to waive my clients'  
9 claims absolutely here.

10 THE COURT: You told me that you were waiving  
11 collection, except through the indemnification.

12 MR. RUBIO: Yes, Your Honor. I don't -- that's  
13 the purpose of the discovery. I don't know if there's  
14 indemnification rights. I think that there's a strong  
15 likelihood, but I don't know that that's the case at this  
16 point. So, again, I don't want to -- if this happens to be  
17 a --

18 THE COURT: All right. But as far as the timing  
19 point is concerned, it really doesn't matter. You could lay  
20 out the argument as you've just laid it out and the deal as  
21 you've just laid it out and you don't actually have to have  
22 this information as part of that prosecution of the  
23 objection. What you're really doing is trying to fix the --  
24 whether there's indemnification rights there worth pursuing.  
25 And if it's just to make the request of Transform to look in

1 the files to find the 38 vendors and whether there's a  
2 vendor agreement, that doesn't seem to be particularly a  
3 burden here.

4 So when I first read this application and the  
5 Debtors' response, it seemed to me that it actually fit  
6 pretty well into two of Judge Bernstein's opinions, both  
7 from the Sun Edison case, 562 B.R. 243 (Bankr. S.D.N.Y.  
8 2017) and 572 B.R. 42 (Bankr. S.D.N.Y. 2017), both of which  
9 -- one, discovery is being sought by the Debtor, one  
10 discovery is being sought by a third party.

11 Judge Bernstein, I think, clearly correctly said  
12 that 2004 doesn't reach so far as to allow a Debtor or a  
13 third party to take discovery from participants in third-  
14 party liquidation involving claims that either the Debtor  
15 doesn't own or that don't affect the Debtors' estate in a  
16 meaningful way.

17 And on top of that, he weighed, as many courts do,  
18 the burden that discovery would take, even if it does fit  
19 within Rule 2004. I think you've gotten it within Rule 2004  
20 now based on the agreement you've laid out. But as far as  
21 burdensomeness is concerned, the seven days (a) it's not  
22 necessary, and (b) it is awfully burdensome to expect people  
23 to provide the documents in that manner and/or object on the  
24 bases of privilege or confidentiality.

25 So I'll grant the application as modified on the

1 record. But it should be, it's just documents you're  
2 looking for, so it should be 21 days to produce them. And  
3 producing here is the vendor agreements for the 38 vendors  
4 within the Debtors' possession, custody or control. The  
5 Debtors have represented to me that it's only the latter  
6 point that applies and it's only to the extent that the  
7 transition services agreement provides for it, so they'll be  
8 making the request to Transform.

9 MS. MARCUS: And just for clarification, Your  
10 Honor, there's not going to be a deposition, right? We're  
11 only --

12 THE COURT: Right. It's just the 38 vendor --  
13 looking for the 38 vendor agreements. So you can email that  
14 order to chambers with a -- you should run it by Miss Marcus  
15 first.

16 MR. RUBIO: I will do that.

17 THE COURT: All right. You probably should run it  
18 by Transform's counsel first. I also think you should  
19 provide a copy -- I'm sorry. My standard form of Rule 2004  
20 order provides that you serve the document subpoena under  
21 2004(c), a copy of the order and the application on the  
22 party providing it. Here, we have that because it's the  
23 Debtor. But I'm going to ask you to also serve it on the 38  
24 vendors and Transform's counsel, since they'll be --  
25 Transform's the party to the vendor services agreement that

1 has the records.

2 MS. MARCUS: Thank you, Your Honor.

3 MR. RUBIO: We will do that, Your Honor.

4 THE COURT: Okay.

5 MR. RUBIO: May I be excused, Your Honor?

6 THE COURT: Yes.

7 MR. RUBIO: Thank you.

8 MR. FRIEDMANN: Good morning, Your Honor. Jared  
9 Friedmann from Weil, Gotshal & Manges on behalf of the  
10 Debtors. The next item we have on the agenda is Debtors'  
11 supplemental motion to enforce the asset purchase agreement.

12 As Your Honor knows, the parties have agreed to  
13 handle at the same time Debtors' supplemental motion to  
14 enforce the asset purchase agreement, along with the  
15 adversary complaint filed by Transform, given the  
16 overlapping issues and given the need to have these issues  
17 resolved expeditiously.

18 Your Honor, we provided this morning a chart of  
19 the 11 issues that we had discussed with you at our  
20 prehearing conference on, I guess it was Tuesday afternoon.  
21 The days are all mixed together. It lists out 11 issues. I  
22 have some good news to report, which is that one of the 11  
23 issues has been resolved, so we are down to 10.

24 THE COURT: Okay.

25 MR. FRIEDMANN: And with respect to that, with

1 Your Honor's permission, I'd like to read into the record  
2 the key terms of that settlement.

3 THE COURT: Okay.

4 MR. FRIEDMANN: And it affects, with respect to  
5 the 11 issues that it affects, the one in the chart that is  
6 referenced as rent prorated on the third page of the chart.

7 THE COURT: Okay.

8 MR. FRIEDMANN: The key terms of the settlement  
9 are as follows: Transform to wire \$8 million on Monday, July  
10 15th for prorated rent for February of 2019 to the Debtors  
11 without any condition on how the Debtors could use the money  
12 or what account it would be placed in, and to escrow \$2.4  
13 million for uncashed checks; escrow to be released to  
14 Transform upon cashing and to be released to Sears after the  
15 applicable (indiscernible) period terminated.

16 THE COURT: I'm sorry. The uncashed checks isn't  
17 a rent proration; that's another part of another category.

18 MR. FRIEDMANN: Actually, yeah. So it resolves  
19 entirely the rent proration issue.

20 THE COURT: It's part of the reconciliations.

21 MR. FRIEDMANN: It resolves \$2.4 million of the  
22 reconciliation issue. So they're now, from the Debtors'  
23 perspective, instead of they're a \$30.4 million issue,  
24 they're now a \$28 million issue on the reconciliation issue.

25 THE COURT: Okay.



1 MR. FRIEDMANN: The transfer of the \$8 million  
2 remains subject to Transform's setoff, recoupment, and other  
3 rights it may have, including as to how the cash is actually  
4 used, as well as the Debtors' rights and defenses to same.  
5 Second, Sears to immediately transfer all the deeds for the  
6 Brooklyn deed parcels upon the making of the payment  
7 described in Item 1. And, Your Honor, there was an  
8 adversary complaint filed, I believe, yesterday by  
9 Transform, which this provision would now moot that  
10 adversary complaint, so that's more good news.

11 THE COURT: That was related to the Brooklyn --

12 MR. FRIEDMANN: Correct.

13 THE COURT: -- real property. Okay.

14 MR. FRIEDMANN: And third, all other rights of the  
15 parties in respect of the APA disputes are fully reserved,  
16 including with respect to the remaining issues on cash and  
17 transit, alleged stay violation, and other proration issues  
18 and Hoffman Estates.

19 THE COURT: Okay. I'm glad you've reached that  
20 agreement. On their rent proration, the \$8 million that's  
21 to be paid, that's a nice round number; it's not the exact  
22 number that the Debtors were claiming. Are the parties'  
23 rights reserved as to any other rent prorations above or  
24 below that?

25 MR. FRIEDMANN: Our position is that this

1 satisfies the rent proration amounts due.

2 THE COURT: Okay. And what about Transform; does  
3 it satisfy Transform on the rent proration too, or is that  
4 one of the rights that's reserved?

5 MR. LIMAN: Your Honor, we're satisfied with --  
6 Lewis Liman on behalf of Transform Holdco.

7 THE COURT: Okay. So this resolves the rent  
8 proration dispute.

9 MR. LIMAN: It does. I think Mr. Friedmann -- we  
10 agree obviously with what Mr. Friedmann stated. I think he  
11 captured, but I apologize if I missed it, that the transfer  
12 of the 8 million remains subject to Transform's setoff,  
13 recoupment, and other rights it may have, including as to  
14 how the cash is used. And there are --

15 THE COURT: That's why I was asking. It's subject  
16 to Transform's rights, except with respect to rent  
17 proration.

18 MR. LIMAN: That's right.

19 THE COURT: Okay, all right.

20 MR. LIMAN: I just wanted to highlight that there  
21 may be issues not ripe for today with respect to --

22 THE COURT: Setoff issues and other issues.

23 MR. LIMAN: Setoff and how the monies are used.

24 THE COURT: Right, for other types of claims.

25 MR. LIMAN: And it's our expectation that once the

1 Brooklyn deeds are transferred, we'll be able to dismiss the  
2 Complaint that was filed yesterday.

3 THE COURT: Okay. And similarly, the Debtors'  
4 rights are preserved, except with respect to the rent  
5 proration issue and the 2.4 million and the agreement on the  
6 delivery of the Brooklyn deed.

7 MR. FRIEDMANN: That's correct. And with respect  
8 to those, obviously, our rights are preserved with respect  
9 to any rights we have in connection with the fact that the  
10 \$8 million was not paid until today.

11 THE COURT: Right, sure.

12 MR. FRIEDMANN: And the efforts we've had to make  
13 to get to this point.

14 THE COURT: Okay. All right, very well. Okay.

15 MR. FRIEDMANN: So, Your Honor, that eliminates  
16 one of the 11 issues; that means there are still 10 left.  
17 And, as I mentioned earlier, the parties prepared a chart,  
18 which hopefully the Court will find helpful as we go through  
19 today. As the chart notes, all 10 issues are listed here.  
20 The parties agree that these are the 10 remaining issues.  
21 The parties, you know, agree in terms of what testimony has  
22 been submitted by each side on each issue.

23 And also, to the extent they anticipate any live  
24 cross-examination today, one issue that the parties have not  
25 full agreement is the order in which we should proceed

1 today. So the order that is before you is Debtors' position  
2 as to the order in which we should proceed, which we submit  
3 makes the most sense because it leads off with the \$166  
4 million ordered inventory versus other payable issue which,  
5 frankly, is the largest issue right now between us being  
6 able to confirm the plan or not being able to.

7 It then, after addressing that with ordinary  
8 course and available cash, which are really the kind of  
9 breach of contract associated claims that affect that \$166  
10 million accounts payable issue. We then propose to address  
11 all the issues that involve witness testimony so that we  
12 could have the witnesses come up just once; to the extent  
13 there's cross-examination, have those cross-examinations.

14 Argue following that, prepaid inventory, specified  
15 receivables, and the reconciliation issue, followed by the  
16 Hoffman Estates issue, which has different witnesses who  
17 would then be able to testify. And then the last issues all  
18 are ones in which neither party anticipates there being any  
19 live cross-examination, which are the Hoffman Estates issue,  
20 the adequate assurance deposit issue, mechanics lien. And  
21 finally, last but not least, my favorite, the EDA funds  
22 issue.

23 THE COURT: Okay.

24 MR. LIMAN: Your Honor, one or two housekeeping  
25 matters, and then with respect to the schedule. With

1 respect to housekeeping, one other item has to do with  
2 exhibits. Your Honor was given a list of joint exhibits,  
3 plus a list of exhibits from Transform Holdco. I'm pleased  
4 to report that we've now agreed on all of the exhibits, and  
5 we have a supplemental list of exhibits that I could pass up  
6 listing those for Your Honor.

7 THE COURT: So are there any in the Transform  
8 Holdco binder that are not agreed at this point?

9 MR. LIMAN: No. I think they are all agreed, Your  
10 Honor.

11 THE COURT: Okay. All right, that's fine. And  
12 then my -- I think my only other question is, I know you  
13 have a list here. I have binders. I want to make sure that  
14 all the exhibits on your list are actually in the binders.

15 MR. LIMAN: I believe they are.

16 THE COURT: Okay.

17 MR. LIMAN: We have gone through them to try to  
18 confirm.

19 THE COURT: As far as you know, they are.

20 MR. LIMAN: As far as I know.

21 THE COURT: All right. There's nothing that's  
22 been subsequently added or subtracted.

23 MR. LIMAN: There are with respect to  
24 housekeeping, also a couple of other items.

25 THE COURT: So that means that all of the binders

1 I have, which includes the binder that says Transform on it,  
2 the two binders, are now agreed to be admissible.

3 MR. LIMAN: That's correct, maybe with one caveat.  
4 There is, with respect to the deposition testimony.

5 THE COURT: Okay.

6 MR. LIMAN: There is an exh- -- there is an  
7 objection that we have with respect to a portion of Mr.  
8 Meghji's testimony; that's referenced -- that objection is  
9 referenced in Footnote 3. It has to do with his testimony  
10 regarding the 166 item, and our view that if the -- twofold:  
11 one, if the Court is going to receive parol evidence, it  
12 should be two-sided; and the second is that we've asked that  
13 we have the opportunity to depose Mr. Meghji -- not to  
14 depose him, but to cross-examine Mr. Meghji in front of you  
15 with respect to that testimony. I don't think Your Honor  
16 needs to reach that issue today, but I just note the  
17 objection.

18 THE COURT: Okay. Well, I think that raises one  
19 other point, which is the exhibits, with the caveat that you  
20 just said, are agreed to be admissible. On the other hand,  
21 depending on the issue, one or both of the parties have  
22 contended that under applicable law, the agreement is clear  
23 on its face and I'm precluded from considering parol  
24 evidence. I'm assuming that their agreement as to  
25 admissibility doesn't waive those arguments, and you just --

1 as you just said.

2 MR. LIMAN: No, Your Honor. Our view is that  
3 those arguments would be preserved.

4 THE COURT: So, for example, the portions of the  
5 testimony for Debtors and Transform on the \$166 million  
6 issue may be admissible, but it may, depending on my view of  
7 the document, not be properly considered.

8 MR. LIMAN: That's correct, Your Honor.

9 THE COURT: Okay.

10 MR. LIMAN: Just one other housekeeping matter,  
11 and then with respect to the order, just a clarification  
12 with respect to what Mr. Friedmann said. As the document in  
13 front of Your Honor reflects, the testimony that is listed  
14 in this document is intended to assist the Court for  
15 purposes of today's hearing.

16 We did not list under that, under the 166, the  
17 declarations of Mr. Kamalani, Mr. Murphy, and Mr. Allen, who  
18 are relevant to the 166. But pursuant to the conference we  
19 had with Your Honor, we did not bring the latter two to the  
20 court today, pending the Court's determination with respect  
21 to parol evidence. But I don't want the schedule to be  
22 misunderstood that --

23 THE COURT: Okay.

24 MR. LIMAN: -- this is the limit of our testimony.

25 THE COURT: Okay.

1 MR. LIMAN: With respect to order, Your Honor, the  
2 simple request that we have is we've got six witnesses here.  
3 It's not clear that there's going to be cross-examination  
4 with respect to all of them. Our view is that we'd like to  
5 get those six witnesses out of the way, and then there  
6 should be plenty of time to turn to the 166 issue, but I  
7 would like to let them go home. All of them would be  
8 prepared once they come up and affirm their declaration and  
9 are subject to any cross-examination to leave, except for  
10 Mr. Kamlani, I think, who planned to stay for the day.

11 THE COURT: Okay. Well, you're prepared either  
12 way, right? This is a request of anyone being surprised.  
13 You knew that there was that issue, both of you?

14 MR. FRIEDMANN: That's correct, Your Honor.

15 THE COURT: All right. I think even though the  
16 \$166 million issue is the \$166 million issue, the big issue,  
17 there's some merit in taking live testimony on discreet  
18 issues first. And my suggestion would be to take the  
19 testimony on the specified receivables in the Hoffman  
20 Estates issue, and then hear from -- well, let me ask you a  
21 question. I'm sorry. Does the testimony on prepaid  
22 inventory at all bleed over into specified receivables?

23 MR. FRIEDMANN: Not with respect to the cross-  
24 examinations that are anticipated.

25 THE COURT: Okay, all right. So why don't we hear



1 from either --

2 MR. FRIEDMANN: The one caveat I will make,  
3 though, is that those two witnesses, you will notice, are  
4 the same two witnesses on the reconciliation issue.

5 THE COURT: Right. No, I understand.

6 MR. FRIEDMANN: And I would suggest let's have  
7 them come up. We'll ask all the questions everybody has,  
8 and then let them be done.

9 THE COURT: That's fair. I just -- just in terms  
10 of timing, why don't we take Ms. Borden and Mr. Gallagher  
11 first on Hoffman Estates.

12 MR. LIMAN: Your Honor, I'm going to step aside  
13 for the other lawyers for Transform Holdco. Mr. Kamalani is  
14 a -- has a short portion of his declaration with respect to  
15 specified receivables. My question is whether you would  
16 like to have him come up and just affirm his declaration,  
17 get that piece of testimony done.

18 THE COURT: Well, we have a lot of declarations  
19 here by people. Are the -- let's see.

20 MR. LIMAN: He also is a witness with respect to  
21 Hoffman Estates.

22 THE COURT: Right. But --

23 MR. FRIEDMANN: Your Honor, if it makes it easier  
24 for the Court. For most of these declarants, we won't have  
25 any objection to their declarations being accepted.

1 THE COURT: No, I know, but I just wanted to make  
2 a different point. Which is, when I normally take direct  
3 testimony by declaration or affidavit, the witness is on the  
4 stand. I ask him or her whether sitting there today -- one  
5 of these declarations was submitted yesterday, but a couple  
6 were submitted third week of June -- was there anything they  
7 wanted to change in their declaration and are they --  
8 knowing it's otherwise going to be used as their direct  
9 testimony. Are all of the declarants here in person today?

10 MR. LIMAN: They are, Your Honor, with the  
11 exception of Mr. Murphy and Mr. Allen, but those are both  
12 related to the 166. So all of the declarants whose  
13 testimony are relevant to the issues being heard today are.

14 THE COURT: Okay. All right. Well, so, Mr.  
15 Kamlani, do you want to come up the stand please, which is  
16 that bench over there. Would you raise your right hand,  
17 please? Do you swear or affirm to tell the truth, the whole  
18 truth, and nothing but the trust, so help you God?

19 MR. KAMLANI: I do.

20 THE COURT: And could you spell your name for the  
21 record, please?

22 MR. KAMLANI: Kunal, K-U-N-A-L, last name Kamlani,  
23 K-A-M-L-A-N-I.

24 THE COURT: Okay. Mr. Kamlani, you have submitted  
25 a couple of declarations in connection with this adversary

1 proceeding/contested matter that is intended to serve as  
2 your direct testimony in the matter; one dated June 25th,  
3 2019 and that might be it. The rest is your deposition, I  
4 believe. Just confirm that. Yes. So obviously, that  
5 wasn't that long ago. But sitting here today on July 11th,  
6 is there anything in that declaration that you wish to  
7 change as your direct testimony?

8 MR. KAMLANI: No, there isn't.

9 THE COURT: Okay, very well. So you could sit  
10 down again.

11 MR. KAMLANI: Thank you.

12 MR. LIMAN: Your Honor, we would move the  
13 declarations into evidence.

14 THE COURT: That's fine. As Mr. Kamlani's direct  
15 testimony, which I'm considering on these designated  
16 paragraphs. So then, you want to call Jane Borden?

17 MR. WEAVER: Good morning, Your Honor. Andrew  
18 Weaver, Cleary Gottlieb Steen & Hamilton, on behalf of  
19 Transform. At this point in time, we'd like to ask Miss  
20 Jane Borden to take the stand.

21 THE COURT: Okay. Would you raise your right  
22 hand, please? Do you swear or affirm to tell the truth, the  
23 whole truth, and nothing but the truth, so help you God?

24 MS. BORDEN: Yes.

25 THE COURT: Okay. And Miss Borden, it's B-O-R-D-

1 E-N, right?

2 MS. BORDEN: B-O-R-D-E-N.

3 THE COURT: Miss Borden, you submitted declaration  
4 in support of Transform Holdco's brief in opposition to the  
5 Debtors' supplemental motion to enforce the asset purchase  
6 agreement. I have it at Tab L in my binder, and it's dated  
7 June 25th, 2019. Sitting here today on July 11th, is there  
8 anything in that you'd like to change as your direct  
9 testimony?

10 MS. BORDEN: No.

11 THE COURT: Okay. So that will constitute your  
12 direct testimony.

13 MR. WEAVER: Thank you, Your Honor. Just should  
14 we move for admission?

15 THE COURT: Yes. It's admitted as Ms. Borden's  
16 direct testimony.

17 MR. WEAVER: Thank you. She's available for  
18 cross.

19 THE COURT: Do you have cross?

20 MR. FRIEDMANN: Yes, Your Honor. Jared Friedmann  
21 again from Weil, Gotshal on behalf of the Debtors. With the  
22 Court's permission, Jennifer Brooks Crozier will be taking  
23 this cross-examination, and her pro hac vice application is  
24 in process right now.

25 THE COURT: Okay.

1 MR. FRIEDMANN: I can promise you that Weil,  
2 Gotshal will assure that all fees are paid, and everything  
3 is finalized. But with the Court's permission, I'll have her  
4 take this cross-examination.

5 THE COURT: That's fine.

6 MR. FRIEDMANN: Thank you.

7 MS. CROZIER: Thank you, Your Honor. Jennifer  
8 Crozier, Weil, Gotshal & Manges for the Debtors. Good  
9 morning, Ms. Borden.

10 CROSS-EXAMINATION OF MS. BORDEN

11 BY MS. CROZIER:

12 Q Ms. Borden, you're the president of Sears' real estate  
13 group or division, correct?

14 A That's correct.

15 Q And you've served in that capacity since June 15th,  
16 2018, correct?

17 A Yes.

18 Q Now, before your tenure at Sears, you were senior vice  
19 president of real estate for 24-Hour Fitness; is that  
20 correct?

21 A That's correct.

22 Q And so, to be clear, Ms. Borden, when you stated in  
23 your declaration that in your role as president of Sears'  
24 real estate, you have, quote "always" unquote, considered  
25 Store 490 to encompass all property owned by Sears at

1 Hoffman Estates. Hoffman Estates, or rather always refers  
2 to a period of time dating back to June 2018, correct?

3 A That was my period of time that I was employed, yes.

4 Q Now, you also testify in your declaration that in your  
5 capacity as president of Sears' real estate, you devoted  
6 substantial time and attention to the Debtors' sales of  
7 certain of their properties to Transform in connection with  
8 the sale transaction, correct?

9 A That's correct.

10 Q And so, you understand, Ms. Borden, the diligence in  
11 connection with the Debtors' sale process included an  
12 electronic data room that contained documents related to  
13 Sears' assets and operations.

14 A That's correct.

15 Q And that electronic data room is called Intralinks; is  
16 that right?

17 A Yes.

18 Q And you also understand then that the store numbers on  
19 Schedule 1.1(p) to the APA corresponded to documents in  
20 folders in the Intralinks data site, correct?

21 A Yes. But there may or may not have been documents in  
22 the Intralinks data site for properties on that schedule.

23 Q Okay. But you do understand that the store numbers on  
24 Schedule 1.1(p) did correspond to documents in folders in  
25 the Intralinks data site, correct?

1 A To the extent there were documents for a certain  
2 property, yes.

3 Q Okay. And you would agree with me, Ms. Borden, that  
4 the documents in the Intralinks folder for site 490 related  
5 only to Lots 1(a), 2 and 3 in the Hoffman Estates  
6 development, correct?

7 A My understanding is that the documents in Intralinks  
8 for 490 did relate to those three parcels.

9 Q And isn't it true, Ms. Borden, that the documents in  
10 the Intralinks data site that corresponded to the store  
11 numbers on Schedule 1.1(p), those were provided by the  
12 Sears' real estate group, correct?

13 A So documents in the Intralinks data site were provided  
14 by Sears and our professional outside counsel, yes.

15 Q And is it also fair to say that your real estate or  
16 Sears' real estate group made an effort to ensure the  
17 documents in the Intralinks site were complete and accurate?

18 A Well, we told all parties going into the Intralinks  
19 data site that we provided the documents that we had  
20 available to us, but we didn't make representations that  
21 everything was in there with regard to any site.

22 Q Okay. And so, your testimony sitting here today is  
23 that Sears' real estate group made no efforts to ensure that  
24 the documents in the Intralinks data site were complete and  
25 accurate.

1 A No, that's not my testimony.

2 Q Okay. So did the Sears' real estate group make an  
3 effort to ensure that the documents in Intralinks were  
4 complete and accurate?

5 A We made an effort to ensure that the documents in  
6 Intralinks were all the documents we had available to us.

7 Q Thank you.

8 MS. CROZIER: No further questions, Your Honor.

9 THE COURT: Okay. Any redirect?

10 MR. WEAVER: Very briefly, Your Honor.

11 REDIRECT EXAMINATION OF MS. BORDEN

12 BY MR. WEAVER:

13 Q Ms. Borden, you were asked questions about the  
14 documents in the Intralinks site as part of the process  
15 before the sale transaction. Do you know mechanically how  
16 those documents were pulled?

17 THE COURT: I'm sorry, were what?

18 MR. WEAVER: How those documents were pulled into  
19 the Intralinks site, the process.

20 A I'm not exactly sure. I understand there was a  
21 previous data site, virtual data site with documents, and  
22 many of them were pulled from that and put into Intralinks.

23 Q And the documents that were in the Intralinks site  
24 related to folders for 490, were those associated with the  
25 financing that existed for Lots 1(a), 2 and 3?



1 A That's my understanding. The financing that was done  
2 prior to my arrival at the company, but in spring of last  
3 year, 2018.

4 Q And do you know the time period of the documents that  
5 existed in Intralinks for Store 490, what general period of  
6 time those documents were created?

7 A So the referenced documents for 490 are, I think  
8 they're dated March of 2018.

9 MR. WEAVER: No further questions, Your Honor.

10 THE COURT: Okay. You can step down.

11 MS. BORDEN: Okay.

12 THE COURT: Okay. And we have Mr. Gallagher here?

13 MR. FRIEDMANN: Yes, Your Honor.

14 THE COURT: Okay. You can come up to the stand,  
15 sir. Would you raise your right hand, please? Do you swear  
16 or affirm to tell the truth, the whole truth, and nothing  
17 but the truth, so help you God?

18 MR. GALLAGHER: I do.

19 THE COURT: Okay. And could you spell your name  
20 please for the record?

21 MR. GALLAGHER: William, W-I-L-L-I-A-M, Gallagher,  
22 G-A-L-L-A-G-H-E-R.

23 THE COURT: Okay. And, Mr. Gallagher, you  
24 submitted a declaration as your direct testimony in this  
25 adversary proceeding in a contested matter dated July 3,

1 2019. Sitting here today, July 11th, is there anything that  
2 you wish to change?

3 MR. GALLAGHER: I do not.

4 THE COURT: So that would serve as your direct  
5 testimony.

6 MR. GALLAGHER: Yes.

7 THE COURT: Okay, so it also is admitted.

8 MR. WEAVER: Your Honor, the cross-examination  
9 will be with my colleague, Mr. Levander.

10 MR. LEVANDER: Thank you, Your Honor. Your Honor,  
11 with your permission, I'd like to hand the witness a binder  
12 that has his declarations in the exhibits, as well as a few  
13 joint exhibits about which I might ask some questions today.  
14 And I also have copies of that same binder for Your Honor  
15 and Mr. Gallagher's counsel.

16 THE COURT: You said declarations in the plural.  
17 Are you referring to the May declaration also?

18 MR. LEVANDER: That's correct.

19 THE COURT: Okay, May 2019.

20 MR. FRIEDMANN: Your Honor, for clarification, we  
21 are submitting both of those declarations. They're both  
22 related to the issues before you today, so I'm not sure if  
23 the --

24 THE COURT: All right. Well, let me ask you -- it  
25 wasn't on the list, so I didn't ask him about it. Mr.

1 Gallagher, are you familiar with your May 24, 2019  
2 declaration also in this matter?

3 MR. GALLAGHER: I am.

4 THE COURT: It's at Tab B in my notebook. Sitting  
5 here today on July 11th, was there anything in that  
6 declaration you would like to change as your direct  
7 testimony?

8 MR. GALLAGHER: No.

9 THE COURT: Okay, fine. So, yes, you can hand him  
10 that book.

11 MR. LEVANDER: Thank you, Your Honor.

12 THE COURT: Provide me a copy and Debtors' counsel  
13 a copy.

14 MR. LEVANDER: I apologize for the size and  
15 weight, Your Honor. There are only a few documents in here.

16 THE COURT: Okay.

17 MR. LEVANDER: One of them is the order with the  
18 APA disclosure schedules. That is a quite lengthy document.

19 THE COURT: Right, okay.

20 MR. LEVANDER: So that accounts for most of the  
21 size. There are only a few documents in the binder.

22 THE COURT: Okay.

23 CROSS-EXAMINATION OF MR. GALLAGHER

24 BY MR. LEVANDER:

25 Q Good afternoon -- good morning, Mr. Gallagher. We

1 switched the order, caught me off guard. My name is Sam  
2 Levander and I represent Transform Holdco LLC in this case.  
3 Mr. Gallagher, you are currently a managing director at M-  
4 III, right?

5 A Correct.

6 Q You began working at M-III just in October of 2018,  
7 right?

8 A Yes.

9 Q Before or after Sears filed for bankruptcy?

10 A Just after.

11 Q On what date?

12 A I believe my official start date was Monday -- it might  
13 have been the same day -- 16th, 15th?

14 Q October 15th?

15 A Yeah.

16 Q So that's less than four months before the closing  
17 occurred on February 11th, 2019, correct?

18 A That sounds correct, yes.

19 Q And you only started working for and on behalf of Sears  
20 and the Debtors in October of 2018 as well, correct?

21 A Correct.

22 Q Before October 2018, had you ever been employed by  
23 Sears in any capacity?

24 A I had not.

25 Q Before October 2018, had you ever done any work for or

1 on behalf of Sears' real estate department?

2 A No, I had not.

3 Q Before October 2018, had you ever done any kind of work  
4 whatsoever for or on behalf of Sears?

5 A No.

6 Q All right. Mr. Gallagher, are you familiar with the  
7 operating owned property schedule in the asset purchase  
8 agreement or the APA?

9 A Generally, yes.

10 Q And that is Schedule 1.1(p) to the APA?

11 A That sounds right.

12 Q And one of the properties in Schedule 1.1(p) is Store  
13 No. 490, Hoffman Estates, right?

14 A That sounds correct, yes.

15 Q Sears owns 16 lots in Hoffman Estates, right?

16 A That is correct as to what we have now realized, yes.

17 Q So the answer to the question is yes.

18 A Yeah.

19 Q And your testimony is that Store No. 490, Hoffman  
20 Estates, has listed in Schedule 1.1(p) only applies to 3 of  
21 those 16 lots, right?

22 A Correct.

23 Q And that, therefore, Transform only acquired 3 of those  
24 16 lots.

25 A Yes.

1 Q And those lots that were acquired are Lots 1(a), 2 and  
2 3?

3 A Yes.

4 Q And your testimony is that only those three acquired  
5 lots, 1(a), 2 and 3, related to the operations of Sears'  
6 business.

7 A Correct.

8 Q And while the other 13 lots, the currently disputed  
9 lots, did not relate to the operation of Sears' business.

10 A Correct.

11 Q Sears' headquarters is actually on Lot 1(a), right?

12 A That's my understanding, yes.

13 Q And there are no buildings on Lots 2 and 3?

14 A There are no specific buildings that I'm aware of the  
15 two front lots, there might be 1 and 3. The building might  
16 be on 2, by the way.

17 Q Which building might be on 3?

18 A The headquarters might be on Lot 2. It might be 1 and  
19 3 are the front lots on Beverly Road.

20 Q In any event, there are no buildings on two of those  
21 three lots, correct?

22 A There are no buildings. There are some amenities and  
23 roads on the lots.

24 Q You testified that one of those two lots is related to  
25 the operation of Sears' business because it contains

1 baseball fields, a basketball court and a volleyball court?

2 A I testified that I believe those lots are related to  
3 more of the building because it's the natural entrance to  
4 the property. The road to the property with the security  
5 gate runs through one of the lots, and there are amenities  
6 that are for the use of Sears' employees on one of the other  
7 lots.

8 Q But for one of the lots, the basis is that there are  
9 amenities on that lot.

10 A And its proximity; the primary entrance to the property  
11 runs right through it. There's signage right on Beverly  
12 Road that identifies that that is the primary entrance to  
13 the Sears location that transitions through those two lots.

14 Q So when did you come to understand that there were lots  
15 in Hoffman Estates that Transform -- that, in your  
16 testimony, Transform did not acquire?

17 A Not until a letter was sent stating so or objecting to  
18 the transfer in March.

19 Q And is your testimony today that these 13 lots are  
20 associated with a store number other than 490?

21 A My testimony is that the 13 lots have nothing to do  
22 with the operation, and that the association to 490 is not  
23 relevant.

24 Q What store number are those 13 lots associated with?

25 A They are associated with 490.

1 THE COURT: I'm sorry, say that.

2 MR. GALLAGHER: They are associated with 490.  
3 There's a single number for all of Hoffman Estates.

4 MR. LEVANDER: That's all. I have no further  
5 questions.

6 THE COURT: Okay. Any redirect?

7 MR. FRIEDMANN: No redirect, Your Honor.

8 THE COURT: Okay. I have a question, Mr.  
9 Gallagher. Are you familiar with the tax benefit issues  
10 related to Hoffman Estates?

11 MR. GALLAGHER: So I have read and I've heard a  
12 little bit about the EDA, the Economic Development Agency,  
13 for that site.

14 THE COURT: Right.

15 MR. GALLAGHER: I don't know the specifics of how  
16 tax dollars work. And in some ways, there's an obligation  
17 to generate revenues, I believe, I think is what I read.  
18 But I don't know the specifics, Your Honor.

19 THE COURT: So knowing that answer, I probably  
20 know the answer to my next question. Does the -- to your  
21 knowledge, does the continued ownership by one entity of all  
22 16 lots, as opposed to just 3, affect that arrangement in  
23 any way?

24 MR. GALLAGHER: I don't believe it would, but I  
25 don't know the specifics.



1 THE COURT: Okay, all right. Does anyone want to  
2 ask any question on that? Okay. You can step down, sir.

3 MR. FRIEDMANN: Is it, Your Honor, agreeable to  
4 arguing this point now?

5 THE COURT: No. I was about to ask both of you  
6 that question. Obviously, the testimony is fresh in  
7 everyone's mind, so I'm happy to go either way with how  
8 people want to do this. Are you -- are the two of you  
9 involved in any of the other matters that are on the  
10 calendar today?

11 MR. FRIEDMANN: The lawyers, Your Honor?

12 THE COURT: Yes.

13 MR. LIMAN: Yes.

14 THE COURT: You are, okay.

15 MR. FRIEDMANN: I'm not, Your Honor.

16 THE COURT: All right. Well, I leave it up to  
17 you. I'm happy to hear oral argument on these piecemeal or  
18 hear all the evidence and then go back to it.

19 MR. FRIEDMANN: Your Honor, I deferred really to  
20 the request for Transform's counsel before. The goal is to  
21 get all the witnesses done and have --

22 THE COURT: Right.

23 MR. FRIEDMANN: -- do this because it's going  
24 quickly. Hopefully, we can maintain that pace.

25 THE COURT: All right. Well, this wasn't

1 voluminous testimony. I think I can keep it in my head for  
2 another few hours. So why don't we go to --

3 MR. FRIEDMANN: That's fine, Your Honor. Thank  
4 you.

5 THE COURT: Why don't we go to Mr. Tavakoli then  
6 and the specified receivables issue. Could you raise your  
7 right hand, please? Do you swear or affirm to tell the  
8 truth, the whole truth, and nothing but the truth, so help  
9 you God?

10 MR. TAVAKOLI: I do.

11 THE COURT: Okay. Could you spell your name for  
12 the record, please?

13 MR. TAVAKOLI: Nader, N-A-D-E-R, Tavakoli, T-A-V-  
14 A-K-O-L-I.

15 THE COURT: Okay. And, Mr. Tavakoli, I have your  
16 declaration in support of Transform Holdco's brief in  
17 support of the adversary complaint and in opposition to  
18 Debtors' supplemental motion to enforce the asset purchase  
19 agreement. It's dated June 26, 2019, and it would serve as  
20 your direct testimony in this adversary proceeding and  
21 contested matter. Sitting here today on July 11th, is there  
22 anything you'd wish to change in it?

23 MR. TAVAKOLI: No, Your Honor.

24 THE COURT: All right. So that'll be your direct  
25 testimony and it's admitted as such. So do you wish to

1 cross-examine?

2 MR. FRIEDMANN: Yes, Your Honor.

3 THE COURT: Okay.

4 CROSS-EXAMINATION OF MR. TAVAKOLI

5 BY MR. FRIEDMANN:

6 Q Good morning, Mr. Tavakoli.

7 A Good morning.

8 Q You were engaged to assist with, among other things,  
9 the collection of specified receivables as identified in the  
10 asset purchase agreement, correct?

11 A That's right.

12 Q And did part of that also entail trying to calculate  
13 the amount of specified receivables that were delivered at  
14 the time of closing by the Debtors to Transform?

15 A I'm not sure I understand your question.

16 Q Do you understand that, as part of the asset purchase  
17 agreement, the Debtors were required to transfer certain  
18 specified receivable accounts to Transform?

19 A I do.

20 Q And you understand that under the APA, the amount of  
21 specified receivables to be provided were supposed to have a  
22 book value of at least \$255.2 million?

23 A I've seen that information, yes.

24 Q Was part of your engagement to determine whether or not  
25 the Debtors did, in fact, deliver specific receivables to

1 Transform at closing in an amount up to a book value of  
2 \$255.2 million?

3 A No, I don't think specifically that task. I mean, we,  
4 as I said in my declaration, we went through the process of  
5 trying to validate actual receivables because, as we began  
6 to get into the collection process, it was clear that there  
7 were significant issues with some of the buckets. But I'm  
8 not sure that I would answer the specific question you're  
9 asking me in the affirmative.

10 Q So it's fair to say that you don't have a -- you're not  
11 here to testify as to the amount of specified receivables  
12 that were delivered by the Debtor to Transform at the close,  
13 correct?

14 MS. MAINOO: Objection. Your Honor, this calls  
15 for interpretation of the APA and a legal conclusion.

16 THE COURT: No, I don't think so. It's just what  
17 it is he's testifying to. Do you want to hear that question  
18 again or do you remember it?

19 MR. TAVAKOLI: No, I think I understand the  
20 question, Your Honor.

21 A I'm not completely sure of the definition of specified  
22 receivables. I wasn't there for the negotiations and, quite  
23 honestly, I haven't studied the definition. My testimony  
24 really revolves around what portion of the 255 constituted  
25 what I would call valid receivables, so that there was a

1 receivable to collect that had a chance to collect on the  
2 part of Transform in the go-forward process.

3 Q Mr. Tavakoli, in the declaration that was just  
4 submitted as your direct statement -- as your direct  
5 testimony here, you say in Paragraph 5: "At closing, the  
6 Debtors purport to have delivered 292 million of specified  
7 receivables." Do you recall including that statement in  
8 your declaration?

9 A I do.

10 Q Okay. And you just testified that you're not sure what  
11 specified receivables means in the context of the asset  
12 purchase agreement?

13 A I think my inference from your question was you were  
14 asking me to opine on whether those specified receivables  
15 within the definition of the APA were delivered. And I'm  
16 not meaning to quibble with you, but I view that as a very  
17 technical issue. So I don't know everything that went into  
18 the definition of specified receivables, expectations as to  
19 specified receivables and so on. I have looked at the APA  
20 and I affirm that that was in my declaration, sure.

21 Q Okay. And Mr. Tavakoli, no one's looking to quibble  
22 here. I'm just trying to be clear what you are able to  
23 testify to and what you're not based on the work that you  
24 actually conducted, and I only want to ask you question  
25 about the work you did, not anything else. And that's why

1 I'm trying to understand is whether or not you did the work  
2 to be able to determine what the amount of specified  
3 receivables, as that's defined in the APA, were delivered --  
4 that were delivered from the Debtors to Transform at the  
5 closing.

6 A I think I can answer that in the affirmative, if what  
7 you mean is did we do the work within all of the 33 buckets  
8 that constituted the specified receivables to determine  
9 which were actually receivables; yes, we did that work.

10 Q And did you determine what the book value was of the  
11 specified receivables that the Debtors transferred to  
12 Transform as of the closing?

13 A I'm not sure what you mean by book value.

14 Q Well, there are 33 buckets you were just referring to,  
15 right?

16 A Yup.

17 Q Those are all like accounting line entries.

18 A Yes.

19 Q Okay? And if you add them all together, you got a  
20 total?

21 A Yes.

22 Q When I'm talking about the book value, I'm talking  
23 about totaling all of those entries together to get an  
24 aggregate number. Were you -- with that clarification, let  
25 me give you the question again. Was part of your engagement

1 to assess what the book values were of each of the line  
2 items that were delivered by the Debtor to Transform at  
3 closing to determine what the aggregate book value was of  
4 the specified receivables that the Debtors transferred to  
5 Transform at the close?

6 A So as a finance person, I think of book value as a  
7 technical term. That would mean that this was assets on the  
8 Debtors' balance sheet, and I can't answer that question.  
9 If you're simply asking me whether the numbers on the piece  
10 of paper that were given to us as constituting the specified  
11 receivables add up to 292, I think the answer to that is  
12 yes.

13 Q And do you know if those numbers came from the Debtors'  
14 balance sheet?

15 A I don't.

16 Q Okay. The process that you've engaged in to do what I  
17 believe you described as a manual reconciliation to process,  
18 identify, and substantiate various specified receivables,  
19 how long have you spent on that?

20 A Well, my team consists of two people, each of whom has  
21 over 25 years of payables receivables experience working  
22 with me, and I was overseeing the process for the most part,  
23 in touch with them daily either in person or on the phone.  
24 And I think we said in the declaration that in total, we  
25 spent about 14- to 1500 hours on this assignment.

1 Q And over what period of time has your team spent that  
2 14- to 1500 hours?

3 A So we started out our assignment in early March. And,  
4 you know, the assignment zigged and zagged and morphed over  
5 time, but I would say since the beginning of March.

6 Q So since the beginning of March, your team has devoted  
7 on average several hundred hours a month to working on this  
8 reconciliation of the specified receivables that were  
9 delivered by the Debtor to Transform at closing?

10 A Yes, sir.

11 Q And your efforts, by the way, are still ongoing,  
12 correct?

13 A Well, we stopped around June 26th. So we're assessing,  
14 I think, with Transform what the best process is going  
15 forward given where we are now in the assessment of the  
16 receivables.

17 Q And you've used a number of different reconciliation  
18 methodologies to determine the values of the different  
19 accounts receivables that were transferred as part of the  
20 specified receivables, correct?

21 A I think we -- two essential methodologies; one with  
22 respect to accounts 11482, the Kmart basket, one with  
23 respect to 11488, the Sears basket, and then a different  
24 methodology for the other 31 or so baskets of accounts  
25 receivable. But I'd say, in terms of methodology, there



1 were two essential methodologies.

2 Q Okay. And both of these methodologies were different  
3 than how Sears was reporting on its balance sheet how it was  
4 calculating the amount of specified receivables, correct, in  
5 any of those 33 baskets?

6 A I don't know that.

7 MR. FRIEDMANN: No further questions, Your Honor.

8 THE COURT: Okay. Any redirect?

9 MS. MAINOO: Briefly, Your Honor.

10 REDIRECT EXAMINATION OF MR. TAVAKOLI

11 BY MS. MAINOO:

12 Q Good morning. My name is Abena Mainoo from Cleary,  
13 Gottlieb. I represent Transform. Good morning, Mr.  
14 Tavakoli.

15 A Good morning.

16 Q Mr. Tavakoli, can you explain what your mandate was  
17 when Transform hired you?

18 A It was a dual mandate; in essence, to assist with the  
19 reconciliation and negotiation of cure claims and other  
20 claims on the top 200 vendors, and then also to assist with  
21 the reconciliation collection of the specified receivables.

22 Q And what was the scope of your mandate specifically  
23 with respect to the specified receivables?

24 A Well, we really started out trying to assist in the  
25 collection process. And then, given the vagaries of the

1 receivables, the accounts receivable and the complexity of  
2 the systems, it became largely reconciliation, and then  
3 working with the business units and the account owners to  
4 help them facilitate with the collection after we'd gone  
5 through the reconciliation process.

6 MS. MAINOO: No further questions.

7 THE COURT: Okay.

8 MR. FRIEDMANN: One further.

9 THE COURT: Sure.

10 RE CROSS-EXAMINATION OF MR. TAVAKOLI

11 BY MR. FRIENDMAN:

12 Q Mr. Tavakoli, you were just asked about your mandate.  
13 Under the mandate that you have with Transform, how are you  
14 compensated? Is it by the hour, is it contingency fee;  
15 what's the structure?

16 A No, there is no contingency fee. I'm paid an hourly  
17 fee for this assignment.

18 THE COURT: Mr. Tavakoli, in your declaration at  
19 Paragraph 8 and 9, you used a term intended. So in  
20 Paragraph 8, it says, "As detailed further below, the vendor  
21 AR accounts generally record positive balance entries for  
22 payments made for CIA inventory." That's cash in advance.  
23 And then the next sentence says, "Once that inventory is  
24 received, those entries are intended to be reconciled with  
25 the amount of it received in inventory."

1 And then the next paragraph, it says, "The vendor  
2 AR accounts were intended to function in the following  
3 manner, in respect of what was placed with CIA inventory."  
4 Whose intention are you referring to there?

5 MR. TAVAKOLI: Well, it would have been the Debtor  
6 prior to the closing and Transform's post-closing.

7 THE COURT: How do you know that?

8 MR. TAVAKOLI: Conversations, communications with  
9 the team. Jeff Butz and his team at Sears, (indiscernible).

10 THE COURT: Okay. And then on -- let me just turn  
11 to the right page. In paragraph -- well, let me put it this  
12 way. There's some -- on Pages 12 and 13, you deal with  
13 items that fall into -- which you characterize as 28.6  
14 million in invalid receivables, which includes 12.3 million  
15 collected by the estate prior to closing.

16 And I just want to make sure -- there are a couple  
17 of these where it says money was received or prepaid. In  
18 each of those instances, it's your testimony that the money  
19 that was received or prepaid was received by the Debtor  
20 directly, as opposed to by Transform?

21 MR. TAVAKOLI: In those cases where it's indicated  
22 as such, Your Honor. And we have I think in the exhibits  
23 the actual email communications with the team owners were  
24 put in there to verify that.

25 THE COURT: Okay. So, for example, on the bottom

1 of Page 13, there's \$500,451 that it said on June 11, Dawn  
2 Holter confirmed that the balance was received on December  
3 21, 2018 into a temporary account for unapplied cash. That  
4 would have been at Sears? I mean, it doesn't say that  
5 specifically, but I'm assuming that in each of these cases,  
6 you mean it was received or prepaid to Sears.

7 MR. TAVAKOLI: Yes, Your Honor.

8 THE COURT: Okay.

9 MR. TAVAKOLI: I think there's one or two that are  
10 intercompany accounts.

11 THE COURT: Right, that's a different category.

12 MR. TAVAKOLI: Yup.

13 THE COURT: Okay. Any cross on that?

14 MR. FRIEDMANN: No, Your Honor, only that we move  
15 to strike Paragraphs 8 and 9 as admissible hearsay based on  
16 the answers to the witness regarding the source of the  
17 information that was just from talking to others and not his  
18 direct knowledge.

19 THE COURT: Okay. Any response on that?

20 MS. MAINOO: Your Honor, in response, the source  
21 of the information in Paragraphs 8 and 9 is based on  
22 business records, and I can ask Mr. Tavakoli to establish  
23 that.

24 THE COURT: Well, it's the intent part. The  
25 dollar numbers I understand. It was intended to be dealt

1 with in a certain way is what I was asking about.

2 MS. MAINOO: Okay.

3 MR. TAVAKOLI: Your Honor, can I just answer that?

4 THE COURT: Well, let me -- give your lawyers a  
5 chance to.

6 MS. MAINOO: And so, just to be clear as to Mr.  
7 Friedman's objection.

8 THE COURT: It's not as to anything other than the  
9 references to intent.

10 MS. MAINOO: The reference to intent, okay.

11 THE COURT: Right, okay. All right, so that's  
12 sustained. All right, you can step down.

13 MR. TAVAKOLI: Thank you, Your Honor.

14 THE COURT: Okay. So then we have Messrs. Hede  
15 and Good for the prepaid inventory and estate property  
16 reconciliations.

17 MR. FRIEDMANN: Mr. Good is here, Your Honor.

18 THE COURT: Okay. So why don't we call Mr. Hede  
19 first.

20 MR. FRIEDMANN: And just as a matter of  
21 housekeeping, both Mr. Hede and Mr. Good also identified as  
22 providing testimony on prepaid inventory. So I would  
23 suggest that their testimony now cover all of them.

24 THE COURT: Yeah, no, it's going to cover both of  
25 those topics.

1 MR. FRIEDMANN: Thank you.

2 THE COURT: Unless you all have another book for  
3 me, I'm going to take a second to get my copies of his  
4 declaration. Okay. Would you raise your right hand,  
5 please? Do you swear or affirm to tell the truth, the whole  
6 truth, and nothing but the truth, so help you God?

7 MR. HEDE: Yes, I do.

8 THE COURT: And could you spell your name for the  
9 record?

10 MR. HEDE: Andrew, A-N-D-R-E-W, last name, Hede,  
11 H-E-D-E.

12 THE COURT: Okay. And Mr. Hede, you submitted two  
13 declarations here. I actually think this chart has the  
14 wrong date for it. I think it's actually June 25th, as  
15 opposed to June 26th, and then July 9th is your supplemental  
16 declaration. Sitting here today, is there anything in those  
17 declarations you'd like to change?

18 MR. HEDE: No, there is not.

19 THE COURT: All right. So they will constitute  
20 your direct testimony.

21 MR. FRIEDMANN: May I proceed, Your Honor?

22 THE COURT: Yes.

23 CROSS-EXAMINATION OF MR. HEDE

24 BY MR. FRIEDMANN:

25 Q Good morning, Mr. Hede.

1 A Good morning.

2 Q In your declaration that was submitted as part of your  
3 direct, or as your direct examination I should say, you  
4 testified that for financial reporting purposes, the Debtors  
5 reported an accounting entry for prepaid inventory; is that  
6 correct?

7 A That's correct.

8 Q And those accounting entries for prepaid inventory that  
9 were used for financial purposes by Debtors, those were used  
10 prepetition for the financial reporting that was given to  
11 their auditors, correct?

12 A That's my understanding.

13 Q And that's also the accounting entry that was used for  
14 financial reporting purposes to the SEC; is that correct?

15 A That's generally my understanding.

16 Q Okay. And that would include the period of time when  
17 Mr. Lampert was the CEO of Sears.

18 A I believe so.

19 Q And that would also include during the period of time  
20 when Mr. Kamlani was on the audit committee of Sears,  
21 correct?

22 A I can't specifically say as to whether Mr. Kamlani  
23 served as a member of the audit committee. I don't know.

24 Q Okay. Now, when Ernst & Young came in to take a look -  
25 - well, strike that and move back. Am I correct that one of

1 the many things that Ernst & Young is going to do in this  
2 case is to determine the amount of prepaid inventory, the  
3 amount prepaid of inventory that was delivered by the  
4 Debtors to Transform at the close?

5 A I classified the amount of prepaid inventory that was  
6 received after the close.

7 Q When you did that analysis, you didn't simply rely on  
8 the accounting entries for prepaid inventory that the  
9 Debtors had historically used for financial reporting  
10 purposes, correct?

11 A That's correct.

12 Q Instead, you developed your own methodology for  
13 determining the amount of prepaid inventory that was  
14 delivered after the close, as you say, from Debtors to  
15 Transform, correct?

16 A That's correct.

17 Q This methodology that you developed for determining the  
18 amount of prepaid inventory that was delivered by Debtors to  
19 Transform after the close, that was a methodology that was  
20 different than the one used by the Debtors in, you know,  
21 both pre- and post-petition in the ordinary course of  
22 tracking prepaid inventory during the course of a year,  
23 correct?

24 A I don't agree with the characterization as to tracking  
25 both prepaid inventory.



1 Q Accounting for the amount of prepaid inventory that  
2 they reported was in the company at any given time.

3 A From an accounting perspective, yes.

4 Q Okay. So they had some ordinary course of how they  
5 kept track -- sorry -- how they accounted for how much  
6 prepaid inventory was in the company at any given time.  
7 That was not what you did; you had a different methodology,  
8 which I assume you believe was the better way to do it.

9 A Correct, and just to clarify that when you refer to  
10 accounting, I would refer to it as a, from a financial  
11 reporting perspective, as opposed to actually physically  
12 counting inventory.

13 Q No one was going on the shelves and counting one  
14 washing machine, two washing machines, right?

15 A Correct.

16 Q I didn't mean to put washing machines on a shelf;  
17 they're too heavy. You were also taking records from the  
18 Debtors' accounting systems, now Transform's accounting  
19 systems. You just were -- you had a different methodology  
20 as to how to take that information and account for the  
21 amount of prepaid inventory delivered after close, correct?

22 A That's correct, with the exception of, I believe that  
23 we used additional information sources beyond what the  
24 Debtors had used in terms of their calculations, so we used  
25 additional information.

1 Q Okay. One of the sources you were not using when you  
2 were developing was you were not running this methodology by  
3 Transform's CEO, Mr. Riecker; is that correct?

4 A That's correct.

5 Q And you also were not running that methodology by Mr.  
6 Butz, who had been an employee at Sears for about 30 years  
7 probably at the time this engagement began; is that correct?

8 A I can't testify as to how long he's been an employee,  
9 but you're correct that we did not run it by him.

10 Q In determining, from Ernst & Young's perspective, the  
11 amount of prepaid inventory that was delivered by the  
12 Debtors to Transform after closing, how much time did you  
13 spend on that or your team spent on that?

14 A A significant number of hours, because it basically  
15 required a recreation of the prepaid inventory records  
16 because the company had not ever maintained a running  
17 account sort of on the basis as to what their prepaid  
18 inventory was.

19 Q Could you give at all as a ballpark figure of the  
20 number of hours spent on this project?

21 A Hundreds.

22 Q Hundreds of hours. Over what period of time?

23 A I'd say a couple of months.

24 Q A couple of months; sounds like a lot of work. Mr.  
25 Hede, another one of the projects that your team is focused

1 on was examining estate checks that were deposited into  
2 Transform's account after the closing, correct?

3 A Correct.

4 Q Okay. And in examining estate checks that were  
5 deposited into Transform's accounts after closing, you  
6 determined that a little bit more than \$5.9 million worth of  
7 estate checks ended up in Transform's accounts after  
8 closing, correct?

9 A Correct.

10 Q But then in your declaration, which was just submitted  
11 as your direct testimony, you also identified that there was  
12 another 868,105 checks -- worth of checks that Debtors claim  
13 were also deposited in Transform's account that belonged to  
14 the estate for which Ernst & Young has not been able to  
15 locate the information to substantiate that -- whether or  
16 not these are estate checks or Transform property, correct?

17 A I'd characterize it a little differently.

18 Q Please.

19 A When the request was first received from Debtors'  
20 advisors, it was to send us a list of checks, which was  
21 basically every paper check that had been deposited post-  
22 closing at the sale. When we went and reviewed those  
23 checks, we made a determination that approximately 5.9  
24 million did appear to be estate property and the balance  
25 that was -- we were unable to, you know, identify any

1 evidence that would, you know, classify them as estate  
2 property. So I'd just like to clarify that it was never --  
3 the argument was never made that they are estate property.

4 Q And, again, I'm not suggesting that they used --  
5 determined that they were estate property. I think what you  
6 said is you didn't have enough evidence to substantiate that  
7 they were estate property, correct?

8 A That's correct.

9 Q Did you have evidence to substantiate they were  
10 definitely Transform property?

11 A I believe so.

12 Q Okay. So there's this set of about \$858,105 worth of  
13 checks that you don't have enough information determined  
14 right now whether or not they are checks that should belong  
15 to the estate or whether or not they should belong to  
16 Debtors, correct?

17 A That's correct.

18 Q Okay. But when you decided how much was owed to the  
19 estate, you only credited the estate with the ones that you  
20 were able to determine definitely belonged to the estate,  
21 correct?

22 A That's correct.

23 Q The other 500- -- I'm sorry, \$858,105, you kept on the  
24 Transform side of the ledger, correct?

25 A I don't think we put them on any side of the ledger.

1 We highlighted them as being unresolved or potentially still  
2 in dispute between the parties.

3 Q Well, so your assessment of those checks is not  
4 complete yet?

5 A Our assessment is that we've not been able to obtain  
6 any information that would determine them to be estate  
7 property (indiscernible).

8 Q Are you still working to try to figure out who they  
9 belong to?

10 A No.

11 Q No, okay, so your assessment is complete. You decided  
12 that at this point, that \$858,105 will stay with Transform  
13 and not go to Debtors because Ernst & Young couldn't figure  
14 out whether or not they're estate property or Transform  
15 property, correct?

16 A I don't think it's for me to make that determination.

17 Q But your analysis is complete at this point.

18 A Yes.

19 Q Who is making that determination?

20 A I believe that some of it ultimately is going to be  
21 decided by this Court, I would expect.

22 Q I'm sorry, look, that's for sure on most issues. But  
23 my question is, there are -- you got to a point of your  
24 analysis where you said, look, I don't have enough  
25 information with respect to this, I'll call it,

1 approximately \$860,000 worth of checks to figure out if they  
2 belong to Debtors or if they belong to Transform. I don't  
3 know what else to do. Who then made the decision that,  
4 therefore, we're not going to credit them back to the  
5 estate, and instead for now they're going to stay with  
6 Transform?

7 A I expect that that will likely be, in conjunction with  
8 discussions with counsel.

9 Q Counsel made that decision, as far as you know.

10 A I can't say what decision counsel made or what was  
11 found with respect to counsel.

12 Q By the way, of the checks that you were able to  
13 determine were, in fact, estate checks that had been  
14 transferred into Transform -- that had been deposited,  
15 excuse me, to Transform's account, that represented about 85  
16 percent of the checks that you had looked at, correct?

17 A Roughly, yes.

18 Q Okay. And the checks you looked at only were -- you  
19 only looked at checks going out until March 18th, 2019; is  
20 that correct?

21 A They were the checks that the Debtors' advisors asked  
22 us to review.

23 Q Okay. And you haven't looked at any checks from after  
24 March 18th, 2019, correct?

25 A That's correct, with, you know, discussions with the

1 Debtors' advisors. We've said on multiple occasions, if  
2 they're specific and these are not just related to these  
3 checks that you would like us to search for or review, we're  
4 more than happy to look for them. I would expect that the  
5 Debtors have, you know, a fairly good understanding of funds  
6 that they expect to have received.

7 Q Well, you're aware that Debtors made the request since,  
8 in the first month after the close, 85 percent of the checks  
9 ended up -- at least 85 percent belonged to the estate.  
10 You're aware that Debtors asked Transform's advisors to take  
11 a look at maybe the next couple of months to see whether or  
12 not those checks also belonged to the estate, correct?

13 MS. BIBI: Objection, asked and answered.

14 THE COURT: Well, have the Debtors made a request  
15 to look beyond the March date?

16 MR. HEDE: Yes, they have.

17 THE COURT: Oh, okay. I think that's a different  
18 answer than they got before, so it's good we clarified that.

19 Q But you haven't conducted any analysis beyond March  
20 18th, 2019, have you?

21 A That's correct. Our response to that request is that  
22 this is a company that receives, you know, a high number of  
23 checks on, you know, a daily basis. We felt that that was,  
24 you know, burdensome to continue to review every single  
25 check that came in and our response was on that basis. But

1 if the Debtors had specific things that they would like us  
2 to review or to search for then we'd be more than happy to  
3 make that inquiry.

4 Q Mr. Hede, in your experience, if between closing and  
5 March 18th, at least 85 percent of the checks that were  
6 deposited to Transform's accounts you were able to  
7 substantiate definitely belonged to the estate, wouldn't you  
8 think that in the period following March 18th, 2019 there  
9 also would be at least some percentage of checks that also  
10 were deposited into Transform's account that belong to the  
11 estate?

12 A Also, but I can't definitely say.

13 Q Well, you know for a fact, there are at least some,  
14 right?

15 A I only know -- I'm only aware of one definitely.

16 Q So you're aware of at least one. So definitely,  
17 there's at least one, correct?

18 A Yes.

19 Q Okay. And there may be more.

20 A Potentially. I don't know definitely.

21 Q But to date, neither Transform nor its advisors has  
22 made any effort to look at any more checks from after March  
23 18th, 2019 to determine whether or not checks that were  
24 deposited into Transform's accounts actually are property of  
25 the estate, correct?



1 A Correct.

2 MR. FRIEDMANN: Nothing further, Your Honor.

3 Thank you.

4 THE COURT: Okay. Any redirect?

5 MS. BIBI: Good morning, Your Honor. I'll be  
6 brief. Pascale Bibi from Cleary Gottlieb Steen & Hamilton.  
7 I represent Transform.

8 REDIRECT EXAMINATION OF MR. HEDE

9 BY MS. BIBI:

10 Q Good morning, Andrew -- Mr. Hede. I'm going to go back  
11 to talk about prepaid inventory.

12 THE COURT: You're going to have to speak a little  
13 louder. I'm having a hard time hearing.

14 Q I'm going to go back to speak to you about prepaid  
15 inventory. Debtors asked you about the estimate that they  
16 used to calculate prepaid inventory. Do you think the  
17 Debtors' estimate is the right way to count prepaid  
18 inventory?

19 A No, I do not.

20 Q Why not?

21 A The Debtors' estimate was purely based on an accounting  
22 entry, which is essentially used as a proxy for the amount  
23 of prepaid inventory at any one time. It's for GAAP  
24 purposes only, as opposed to, you know, a, you know, running  
25 count of prepaid inventory.

1 Q Why is counting the actual amount of prepaid inventory  
2 important?

3 A Transform obviously under the APA contracted to buy a  
4 certain amount of prepaid inventory. They, you know,  
5 obviously wanted to determine what that exact amount was.  
6 To use Mr. Friedman's example, you can sell washing  
7 machines, but you can't sell an accounting provision.

8 Q When did you learn they were using the GAAP accounting  
9 provision to count their prepaid inventory?

10 A Not definitely until April.

11 Q What was your reaction when you learned that?

12 A I was extremely surprised in relation to something that  
13 you have an economic benefit -- an economic impact to other  
14 parts of the transaction that the Debtors and their advisors  
15 had not maintained sort of their running count of what  
16 prepaid inventory was at the closing.

17 Q Do you know if M-III partners, the Debtors' advisors,  
18 ever did any work to see if three weeks, the amount in their  
19 accounting estimate was a good number to use to calculate  
20 prepaid inventory?

21 A I can't specifically say.

22 Q Did you work with anyone at Sears to develop your  
23 methodology?

24 A We worked with the treasury and the inventory  
25 management groups to well understand sort of the wire of

1 funds, and also sort of counting towards the way it was  
2 received. And, obviously, you know, obtained extensive  
3 amounts of information from them in our analysis.

4 Q Just one more question. Did Debtors ever give you any  
5 feedback on your counting methodology?

6 A No, they did not.

7 Q Thank you. Let's talk about reconciliation then. So  
8 Debtors talked a lot about checks being counted before March  
9 18th that you determined belonged to the estate. Did you  
10 find that at least 85 percent of those checks belonged to  
11 the estate?

12 A I believe it was approximately. I don't have the  
13 numbers in front of me or a calculator, but I believe that  
14 was, you know, in the ballpark.

15 Q Is there any information the Debtors could give you to  
16 help you figure out what these checks are?

17 A No.

18 Q Is there any information they could give you --

19 A Sorry, I can't hear the question.

20 Q Is there any information Debtors could give you to help  
21 you to figure out which checks belonged to the estate?

22 A As I said earlier, if the Debtors could narrow down  
23 potentially the nature of the checks and potentially the  
24 payor, that would sort of, you know, narrow the process down  
25 and what we need to search for. Like when, you know, there

1 was one specific example of that there was no issue. We  
2 confirmed it was Debtor property and actually we paid over  
3 the funds to the Debtors.

4 Q Can you explain what happened with that one specific  
5 example you mentioned?

6 A It was in relation to I believe the cancellation of  
7 sale of the liquor licenses in the State of Michigan. The  
8 Debtors and their advisors reached out specifically in  
9 relation to that amount. We confirmed that it had been  
10 deposited and the funds were transferred back to the  
11 Debtors.

12 Q So we've talked a lot about these checks, but what kind  
13 of checks did Sears receive? What items are these,  
14 generally?

15 A Estate checks are these proceeds that relate to things  
16 such as tax refunds, insurance proceeds, refunds, and  
17 obviously refunds can be permits, et cetera. Typically the  
18 challenge with them is that unfortunately the person doesn't  
19 write on the check memo what it relates to. So it's a  
20 fairly -- it's a manual and time-consuming process to go  
21 back and find out the nature of those checks.

22 Q Would you know that Sears was expecting insurance  
23 proceeds or a tax refund?

24 A Generally, yes. Obviously, for larger items, there's  
25 normally an expectation that you're going to receive

1 something. Obviously from time to time, a check arrives in  
2 the mail, obviously Sears is a very large company, when you  
3 factor in all of their business units.

4 Q Who would be best-placed to know if the check was  
5 coming? The Debtors, or Transform?

6 A Sorry, can you rephrase the--

7 Q Who would be best-placed to know if a check was coming,  
8 the Debtors or Transform?

9 A If it was an estate check, I would say the Debtors  
10 would obviously be best placed.

11 MS. BIBI: Thank you.

12 MR. FRIEDMANN: Brief re-cross, if I may, Your  
13 Honor?

14 THE COURT: Okay.

15 RE-CROSS EXAMINATION OF ANDREW HEDE

16 BY MR. FRIEDMANN:

17 Q All of the former employees of the Debtors all went to  
18 go work for Transform, correct?

19 A I believe the majority. There was testimony earlier  
20 that there are still some employees that (indiscernible) are  
21 left.

22 Q Transform didn't take all of Sears's employees?

23 A My understanding was that there were certain employees  
24 that remained with the estate, so.

25 Q Does Transform have access to all of the former Debtor

1 employees that are now working at Transform?

2 A Obviously, yes.

3 Q And so working as Transform's advisor, as E&Y, you're  
4 able to speak to any of these former employees of the  
5 Debtors who are now working at Transform?

6 A Yes.

7 Q And have you consulted them to help you out with your  
8 check reconciliation projects?

9 A Extensively.

10 Q Mr. Riecker one of those employees?

11 A No.

12 MR. FRIEDMANN: Thank you.

13 MS. BIBI: Your Honor, may I re-direct?

14 THE COURT: Okay.

15 RE-DIRECT EXAMINATION OF ANDREW HEDE

16 BY MS. BIBI:

17 Q In your experience, why do you believe that the Debtors  
18 are better situated to identify whether the checks belong to  
19 the estate?

20 A Obviously after a transaction of this size,  
21 substantially all of the assets purchased by obviously the  
22 buyer of the business, you will typically have a situation  
23 that obviously the estate has knowledge as to what assets  
24 were not acquired.

25 In my experience, having done this on a number of

1 occasions, you build up a model list of what your residual  
2 assets are, and seek to monetize those for the purposes of  
3 the estate. And our expectation would be that the Debtors'  
4 advisors would have done something similar in relation to  
5 obviously larger items such as real estate, but things such  
6 as any receivables, refunds, et cetera, that were not  
7 acquired by Transform.

8 Q And you mentioned the Debtors' Advisors, M-III  
9 Partners?

10 A Yes.

11 Q What's your understanding of their role in this case?

12 THE COURT: I'm sorry, the understanding of what?

13 Q What's his understanding of M-III Partners' role in  
14 this case and their responsibilities to the estate?

15 A I believe in relation to the estate, they're obviously  
16 the primary group, and obviously Mr. Meghji's serving as the  
17 chief restructuring officer in relation to the winding of  
18 the estate, and obviously monetizing remaining assets.

19 Q Is it their responsibility to maximize the estate's  
20 value?

21 A Yes.

22 Q Do you expect them to look for estate assets, as part  
23 of their responsibility?

24 A My expectation is that they're looking under every  
25 rock, for every possible potential source of value for the

1 estate.

2 Q And so they should be looking for property of the  
3 estate, if it's missing?

4 A Yes.

5 MS. BIBI: No further questions.

6 THE COURT: Mr. Hede, in your July 9th  
7 declaration, you state that, in Paragraph 12, due to the  
8 exigencies of closing the sale transaction on the desired  
9 date, rather than establishing a new cash management system,  
10 Transform at closing stepped into the shoes of the majority  
11 of the Debtors' existing cash management system, and used  
12 the system to continue to run the acquired business after  
13 closing. What did you mean by using the phrase the majority  
14 of?

15 MR. HEDE: Obviously the Debtors had a very large  
16 cash management system in terms of number of bank accounts.  
17 I won't bore you with the details regarding the short period  
18 of time, and et cetera, but we identified the accounts that  
19 were necessary for the assets that were being acquired. Any  
20 bank accounts that were either related to something such as  
21 GOB store, or something that wasn't critical for running the  
22 business, we left funds with the estate.

23 THE COURT: Okay, and is this the cash management  
24 system that Transform is still using? Has it been altered,  
25 or is it the same system?



1 MR. HEDE: I would say that it's largely the same  
2 as what acquired. Obviously some changes in relation to new  
3 accounts, but it's largely the same.

4 THE COURT: Okay, and in Paragraph 7, you say it  
5 is typical for businesses to track prepaid inventory on an  
6 individual vendor basis. And so EY's methodology  
7 effectively recreated individual vendor prepaid inventory  
8 accounts. I take it from that statement that Sears, the  
9 Debtors as a whole, didn't track prepaid inventory on an  
10 individual vendor basis?

11 MR. HEDE: That's correct.

12 THE COURT: So when you said EY's methodology  
13 effectively recreated individual vendor prepaid inventory  
14 accounts, how did you go about doing that?

15 MR. HEDE: Your Honor, I'll take a step further  
16 back. How you would typically look at prepaid inventory on  
17 a vendor basis is that you would -- you obviously book the  
18 wire, or the industry payment, which obviously creates the  
19 prepaid inventory. When the inventory comes in, that  
20 reduces the amount of the prepayment, which you can see on  
21 an individual vendor-by-vendor basis the amount of prepaid  
22 inventory.

23 What we did was to take the wires that were issued  
24 in the six weeks prior to the closing on an individual  
25 vendor basis, match those with the purchase orders that were

1 issued, and then look at inventory that was received when it  
2 was received, pre- and post-closing, to come up with the  
3 individual vendor basis.

4 So for example, the numbers I'm using are  
5 hypothetical. If Whirlpool received \$20 million worth of  
6 wires during that period of time, they would then issue  
7 purchase orders for approximately that number as well. We  
8 would then match the actual receipt of the inventory. If  
9 \$15 million had been received by Whirlpool prior to the  
10 closing, then the prepaid -- the amount that was received  
11 post-close, which equals to the prepaid inventory would be  
12 the remaining five million.

13 THE COURT: And all that data was readily  
14 available?

15 MR. HEDE: It was readily available. It's from  
16 multiple sources. The wire detail comes from Treasury. It's  
17 not linked to the actual purchase order. The two run  
18 separately. The purchase order data is available in terms  
19 of what purchase order was issued, and then Sears maintains  
20 a matching system in relation to inventory. Obviously, the  
21 amount of --

22 THE COURT: The matching system of what? I'm  
23 sorry, matching system of what?

24 MR. HEDE: They match it to inventory. So  
25 obviously the amount of inventory they receive, when ten

1 washing machines come in, they get matched to a purchase  
2 order. Once it's all received, the purchase order cancels  
3 itself out. So by taking those three data sources, we can  
4 see what inventory was received before the closing and  
5 purchased by Transform, and what was actually prepaid and  
6 not received until after the closing.

7 THE COURT: Is your work on this check-able?

8 MR. HEDE: It's been provided to the Debtors.

9 THE COURT: Okay. Are there any assumptions built  
10 into it, like LIFO or FIFO, as far as matching them up?

11 MR. HEDE: No, it's purely based on obviously the  
12 wire, the dollar amount, the dollar the purchase order was,  
13 the original cost. There's no allowances, or potential, to  
14 your example, LIFO or FIFO product.

15 THE COURT: And they tie right into specific items  
16 of inventory?

17 MR. HEDE: Yes, we tie them, for the purchase  
18 orders during this period of time, we tie them at 99 percent  
19 in terms of the inventory that was received, and when it was  
20 received.

21 THE COURT: Okay. And the Debtors, and I believe  
22 make a point that the six weeks is somewhat arbitrary, or --  
23 why was six weeks chosen?

24 MR. HEDE: The Debtors have maintained a three-  
25 week period. We decided to double that to six weeks for the

1 purposes of the analysis. That was the reason why we took  
2 it, we doubled it.

3 THE COURT: Is that because they have a turnover,  
4 somewhere between three and six weeks? I just -- why would  
5 you choose either of them?

6 MR. HEDE: So the three weeks, the origin of the  
7 three weeks is that three weeks is essentially the average  
8 time in which inventory is received, recognizing that some  
9 inventory is received quicker than within three weeks of the  
10 wire, and some is received longer. From a historical  
11 purpose, when my understanding is at the time of the  
12 bankruptcy filing, they were using two weeks, that was  
13 increased to three post-petition, and has been reduced to  
14 two, post-closing.

15 So that was the origin of the three weeks,  
16 recognizing that if some items are received in a shorter  
17 period of time, some of them are potentially received  
18 longer. That's why we took the approach which we thought  
19 was conservative, to double it, to identify wires and  
20 purchase orders for six weeks.

21 THE COURT: All right, okay. Any, any cross on  
22 that?

23 CROSS-EXAMINATION OF ANDREW HEDE

24 BY MR. FRIEDMANN:

25 Q Mr. Hede, you just described the methodology that Ernst

1 & Young used to recreate the original vendor prepaid  
2 inventory accounts. That all, that process you did all  
3 post-close, I assume?

4 A Yes.

5 Q So that methodology that you describe, that was not  
6 available to ESL at the time, or to Debtors when they  
7 negotiated the APA, right? You hadn't created that yet?

8 A That's correct, because it was our understanding, also  
9 based on certain documents that I've seen, that the Debtors  
10 were maintaining a vendor-by-vendor reconciliation of  
11 prepaid inventory at any one time. We had that  
12 understanding until mid- to late-April when after some  
13 questioning by us M-III told us that they simply relied on  
14 the balance sheet calculation.

15 Q Okay, so when the peg was set at \$147 million worth of  
16 prepaid inventory, that the Debtors were required to provide  
17 to Transform, right after the close, they weren't using your  
18 methodology yet, because you didn't come up with that until  
19 April, right?

20 A We weren't even there when the negotiation happened,  
21 so.

22 MR. FRIEDMANN: Thank you.

23 THE COURT: Do you have any redirect?

24 MS. BIBI: Nothing further, Your Honor.

25 THE COURT: Okay, you can step down, Mr. Hede.

1 Okay, and then we could call Christopher Good, Chris Good?  
2 Okay, would you raise your right hand, please? Do you swear  
3 or affirm to tell the truth, the whole truth, and nothing  
4 but the truth, so help you God?

5 MR. GOOD: Yes, I do.

6 THE COURT: Okay, and it's G-O-O-D?

7 MR. GOOD: That's correct.

8 THE COURT: Christopher Good, okay. Mr. Good, you  
9 submitted a supplemental declaration dated July 3 in this  
10 adversary proceeding, contested matter, as well as a  
11 declaration dated May 24th, 2019. Both are intended to be  
12 your direct testimony. Sitting here today on July 11th, is  
13 there anything you wish to change on those?

14 MR. GOOD: No.

15 THE COURT: Okay, so those declarations will be  
16 admitted as his direct testimony.

17 (Good Declarations Admitted into Evidence)

18 CROSS-EXAMINATION OF CHRISTOPHER GOOD

19 BY MS. MAINOO:

20 Q Good morning, Mr. Good.

21 A Good morning.

22 Q The Transform team provided M-III with a list of checks  
23 deposited by Transform through mid-March, correct?

24 A Through March 18th, yes, that's correct.

25 Q And the Transform team agreed to M-III's request to do

1 an audit of those checks, right?

2 A Of the checks through March 18th, yes.

3 Q And the Transform team did the audit, right?

4 A They performed an audit of the checks, I think there's  
5 a certain number of those that are still undeterminable, but  
6 yes, they performed an audit of the checks.

7 Q And as a result of that audit, Transform credited  
8 Debtors for \$5.9 million in estate checks, right?

9 A Yes, 5.9 million.

10 Q Transform and its advisors have been responsive to  
11 issues raised by the Debtors and their advisors, right?

12 A Can you define responsive? I think on some issues,  
13 yes, on some issues, no.

14 Q In your declaration, you said, in virtually every  
15 instance when the Debtors' advisors have pushed back, by its  
16 advisors, have had to either concede, or that additional  
17 funds were owed, Transform and its advisors were responsive  
18 to issues raised by Debtors and their advisors, right?

19 A They have responded to our requests. I think in that  
20 statement that was made that virtually every instance, and  
21 that was in regards to the fact that the vast majority of  
22 the line items have changed over time, since the original  
23 presentation we received from EY.

24 Q And the Debtors' identified P-card expenses that were  
25 satisfied by a pre-closing payment by Debtors to Transform

1 and its advisors, is that right?

2 A Yes, there was a payment that was identified.

3 Q And Transform credited the Debtors for that amount?

4 A Yes, they did.

5 Q Let's talk about your complaints about Transfer's  
6 reconciliation process. In your work for the estate, you're  
7 focused on finding property for the estate?

8 A That's one of our focuses, yes.

9 Q It's your main focus, right?

10 A I'd say maximizing value for the estate is our main  
11 focus.

12 Q And you're committed to making diligent efforts to  
13 maximize value for the estate?

14 A Yes.

15 Q Your declaration says, in response to certain requests,  
16 Transform has said the requested information does not exist.  
17 You don't know if that information exists, do you?

18 A Could you be more specific?

19 Q So in Paragraph 3 of your declaration, you said while  
20 buyer has provided a good deal of information, has yet to  
21 provide all of the information necessary to substantiate its  
22 reconciliations, claiming the requested information either  
23 doesn't exist, is too burdensome, or worse yet, that the  
24 Debtors have not provided a basis for the information.

25 So my question is, you say that -- you're



1 complaining that Transform has said that the requested  
2 information does not exist. But you, yourself, and M-III do  
3 not know if the requested information exists, do you?

4 A I would say for example, checks deposited after March  
5 18th, that information is definitely available.

6 Q And was your request just for checks deposited after  
7 March 18th?

8 A We were hoping that we could just have the same  
9 analysis where the 5.9 was credited, because 85 percent of  
10 the checks were estate property. We were hoping that we  
11 could just continue that analysis post-March 18th,  
12 especially in light of the fact that we know that there were  
13 checks, or at least one check post-March 18th that was  
14 property of the estate.

15 Q You were hoping that EY would do that analysis for you?

16 A They had done analysis before, and so we were hoping  
17 that they would extend that analysis.

18 Q And you have access directly to Transform employees,  
19 correct?

20 A We were able to make requests to them, but EY at this  
21 point has much better access to Transform's employees than  
22 we do.

23 Q You have access to information from Transform under  
24 both the Transition Services Agreement and the APA, right?

25 A Yes, we do, but post-the sale, the well of cooperation

1 is not the same as it was pre-sale.

2 Q So have you requested information, have you requested  
3 access to information from Transform to enable you to do the  
4 reconciliation of checks, for instance?

5 A You've asked for the checks, post-March 18th. We don't  
6 have the checks. We can't do the analysis ourselves, if we  
7 wanted to.

8 Q So you've asked for the checks so that you can do the  
9 analysis yourselves?

10 A We've asked for the checks so we can see it. We before  
11 went through the checks ourselves and noticed checks that  
12 were property of the estate. That's why we asked the  
13 analysis to be done. So if we did receive those, we would  
14 review them.

15 Q That's a separate question. Did you ask for the checks  
16 so that you could do the analysis, or did you ask for EY to  
17 do the analysis for you?

18 A I think both. I mean, we're kind of doing it in  
19 concert.

20 Q You say in your declaration that Transform has not  
21 shown that it removed checks for property taxes. What's the  
22 basis for your view that property taxes should be credited  
23 to the Debtors?

24 A I think similar to specified receivables were prepaid.  
25 It's one of the other liabilities being assumed in the

1 transaction, there's up to 135 million of property taxes.  
2 That number was calculated based upon accrued property  
3 taxes, which was calculated by Mike Morrie at the company.

4 So looking at that number, we just assumed that  
5 whatever the accrued property tax amount at the close of the  
6 transaction, up to \$135 million, would have been assumed,  
7 and thus any checks related to property taxes, they had not  
8 been cashed, obviously they had not been removed from the  
9 accrued property tax balance, and thus would be kind of a  
10 double-count.

11 So we assumed that those checks should be removed  
12 as Transform is assuming up to \$135 million of property  
13 taxes, as long as we were operating in the ordinary course,  
14 which we believe we did.

15 Q So you're assuming that the checks for property taxes  
16 should have been removed, based on your interpretation of  
17 the APA?

18 A I would say collectively, our counsel's interpretation  
19 of the APA and our team collectively. Not -- my personal  
20 interpretation of the APA is not important here.

21 Q And that interpretation of the APA is disputed, right?

22 A On property taxes?

23 Q Correct.

24 A I'm not sure.

25 Q You also testified in your declaration that Transform

1 has not confirmed, it has reconciled other pre-close  
2 payments to ensure that other P-card payments included in  
3 its calculations were not also already paid for by the  
4 Debtors. Mr. Good, you're not aware of any other P-card  
5 payments that were already paid for by the Debtors, are you?

6 A As I sit here now, no, I'm not.

7 Q To your knowledge, M-III is not aware of any other P-  
8 card payments that were already paid for by the Debtors?

9 A To my knowledge, no.

10 Q M-III has not identified to Transform any other P-Card  
11 payments that were already paid for by the Debtors, right?

12 A Even though we don't know of any more, no, we have not.

13 MS. MAINOO: No further questions, thank you.

14 THE COURT: Any re-direct?

15 RE-DIRECT EXAMINATION OF CHRISTOPHER GOOD

16 BY MR. FRIEDMANN:

17 Q Mr. Good, has your access to the leased employees that  
18 are on working for Transform changed since the various APA  
19 disputes have arisen?

20 A Yes. I would say it has.

21 Q Can you explain how it's changed?

22 A They're not as quick to respond and provide information  
23 as they were pre-close. It's clear that whenever there's  
24 something that might be in dispute, I'm sure they're  
25 probably talking to counsel. I'd be speculating, but it's

1 just, it's evident in our side they're -- for some reason or  
2 another they're not as responsive as before.

3 MR. FRIEDMANN: Thank you.

4 THE COURT: So Mr. Good, you were here for Mr.  
5 Hede's testimony, right?

6 MR. GOOD: Yes, I was.

7 THE COURT: He said that he provided the Debtors  
8 with basically the underlying work so that you could cross-  
9 check E&Y's calculation under their methodology of the  
10 prepaid inventory. Do you agree with that statement?

11 MR. GOOD: That it's been provided?

12 THE COURT: Yeah, enough so that you could check  
13 to see whether it was a method -- sound, a sound  
14 methodology.

15 MR. GOOD: I believe that his calculations have  
16 been provided. Where it's difficult to say that we could  
17 check it completely, it's that there are lot of nuances in  
18 the systems where A, there's a lot of them, B, things can be  
19 classified differently. So there seems like there's a lot  
20 of areas where there could be potential pitfalls. So it  
21 would be more than just reviewing an Excel sheet. We would  
22 need to go and spend time with the company and check it more  
23 than just reviewing that.

24 THE COURT: Could you give me an example of where  
25 their judgment calls are -- I think that's what you were

1 suggesting?

2 MR. GOOD: Yeah, for example, one piece that was  
3 concerning is that it wasn't ran by Jeff Butz. And in the  
4 beginning, he says that he takes the wires, and separates  
5 out non-merchandise wires from merchandise wires. In my  
6 experience, I've seen merchandise wires being classified as  
7 non-merchandise wires in the company. So if it hasn't gone  
8 through the AP team, and classifies those, I'm concerned  
9 that there could potentially have been wires for merch that  
10 have been incorrectly categorized as non-merch being removed  
11 from the analysis.

12 THE COURT: Had the Debtors requested that type of  
13 access to do that type of due diligence?

14 MR. GOOD: No, we have not, because we have been  
15 under the impression that we should be operating using the  
16 financial accounting metrics that are coming from the  
17 accounting team.

18 THE COURT: Okay. So what you got, then was Excel  
19 spreadsheets of various categories of -- that go to make up  
20 the prepaid inventories.

21 MR. GOOD: For Mr. Hede's calculation, yes.

22 THE COURT: Okay, there's just Excel spreadsheets.

23 MR. GOOD: I've not gone through them in full  
24 detail, but they're Excel spreadsheets, yeah.

25 THE COURT: Okay. And you asked, and you also in

1 your declaration discussed P-cards. What if anything, at  
2 this point, and I appreciate it's been a moving process,  
3 your May declaration I think identified things that you've  
4 since gotten more information on, as discussed in your July  
5 declaration. What if anything more do you believe you need  
6 or would be needed to verify the accuracy of the P-card  
7 cancellations?

8 MR. GOOD: I think just verifying that there  
9 aren't any other payments, I don't think that would be a  
10 large process, I think it's something --

11 THE COURT: How, how would you go about doing  
12 that?

13 MR. GOOD: Check with the Treasury team to see if  
14 there are any payments we made before, just to confirm.

15 THE COURT: Okay, and on the other categories that  
16 you say that the response so far has been inadequate,  
17 leaving aside the check issue, at this point, what would you  
18 -- do you believe you need to verify the accuracy of the  
19 closed inquiries that are listed in Mr. Hede's declaration?

20 MR. GOOD: I agree the checks are obviously the  
21 large outstanding, those are the biggest numbers.

22 THE COURT: Right. Anything besides that, or the  
23 P-cards that I've just discussed?

24 MR. GOOD: We'd want to spend some time with EY to  
25 confirm something like the telecom expense. For example,

1 there was a million-dollar invoice that got put towards a  
2 GOB store, but apparently it was for several hundred stores.  
3 So just want to make sure that we're not getting hit with  
4 some of those. But for the others, I would say outside of  
5 the ones on the checks, we're definitely closer to resolving  
6 those.

7 THE COURT: Okay. So has this been an iterative  
8 process, so that you would expect for those last few things  
9 you would be able to do it? Or have you been told we're  
10 done now by E&Y, and we're not going to give you any more  
11 access or information?

12 MR. GOOD: I think it was marked complete a couple  
13 days ago. So I'm assuming if we -- hopefully we can reach  
14 out, and iterate on this, and complete it.

15 THE COURT: Okay, any questioning on that?

16 RE-CROSS EXAMINATION OF CHRISTOPHER GOOD

17 BY MS. MAINOO:

18 Q Yes, Your Honor. Mr. Good, are you aware of agreeing  
19 that on April 12th, 2019, amending the asset purchase  
20 agreement, and providing access to members of the Transport  
21 Finance Team for M-III and the Debtors?

22 A To be honest, I'm not a hundred percent aware of that  
23 agreement?

24 Q Are you 20 percent aware of it?

25 A Maybe some number less than that? I honestly did not -



1 -

2 Q Okay, so pursuant to this agreement on April 12th,  
3 Transform agreed to provide reasonable access to Rob  
4 Riecker, Jeff Butz, Jason Barnes, Bill Archambault, Jennifer  
5 Joye, Anthony Minor, Molly Huron, and Ken (indiscernible),  
6 does that ring a bell for you?

7 A Was that -- I don't recall an exact agreement.

8 Q And also pursuant to this agreement, Transform made Mr.  
9 Riecker available for a meeting with M-III and the Debtors.  
10 Are you familiar with that?

11 A Yes, we had a call, I believe April 1st, I do remember  
12 that.

13 Q And since then, have you asked to get access to any of  
14 those employees and been denied access by Transform?

15 A No, I have not been denied access to any employee?

16 Q Has M-III asked for access to any of these employees  
17 and denied access?

18 A Not that I'm aware of.

19 Q Do you know what is included in any -- do you know what  
20 categories of accounts are included in merch and non-merch?  
21 You were testified earlier about those categories.

22 A Categories?

23 Q What's included -- what did you mean when you refer to  
24 merch?

25 A Merchandise inventory. Tangible goods that would be

1 sold by Sears.

2 Q And what did you mean when you referred to non-merch?

3 A Services.

4 MS. MAINOO: No further questions, thank you.

5 THE COURT: Okay.

6 RE-DIRECT EXAMINATION OF CHRISTOPHER GOOD

7 BY MR. FRIEDMANN:

8 Q Just one question, Mr. Good. You mentioned before that  
9 when you were responding to the Court's question about  
10 judgment calls that may have be made by E&Y when they were  
11 analyzing, using their new methodology for the prepaid  
12 inventory, you said based on your experience, and I want to  
13 clarify what you meant by your experience. What period of  
14 time does that cover, that you were working with Sears?

15 A I've been involved with Sears since April -- late April  
16 2016.

17 THE COURT: Okay, you can step down.

18 MR. GOOD: Thank you. I'm sorry, did you have  
19 another question?

20 MS. MAINOO: I don't have any other questions,  
21 Your Honor. I'd like to admit -- I move to admit the April  
22 12th, 2019 letter agreement amending the APA --

23 THE COURT: I think it's already -- I think I have  
24 all the amendments in the record already. It's on the  
25 docket too, so it's fine.

1 MS. MAINOO: All right, thank you, Your Honor.

2 THE COURT: Okay, so I'm assuming after all of  
3 that, that neither side has any additional evidence that it  
4 wants to submit on the Hoffman Estates specified  
5 receivables, estate property reconciliations and prepaid  
6 inventory issues?

7 MR. LIMAN: Your Honor, with respect to specified  
8 receivables, Mr. Butz submitted a declaration. I believe  
9 we've been told that there's no cross-examination requested,  
10 but we would ask that that declaration --

11 THE COURT: Well, that's already here, though, I  
12 think. I mean, I have excerpts from his deposition, as well  
13 as Paragraphs 2 through 9 of his declaration.

14 MR. LIMAN: (indiscernible)

15 THE COURT: I should be clear, I have the evidence  
16 on this page. I'm just wondering in light of the testimony,  
17 whether anybody wants to introduce any additional evidence  
18 besides what I've already been directed to? No?

19 MR. LIMAN: No, Your Honor.

20 THE COURT: Okay, all right, so the record's  
21 closed on those issues. So it's 12:30. The rest is  
22 basically oral argument, right? We have no more witnesses.

23 MR. LIMAN: I think Mr. Klug is here. Again, I  
24 don't think there's any cross-examination requested with  
25 respect to him, but as long as we don't have to -- what I'd

1 like to do is if Your Honor wants him to sit at the table  
2 and affirm the declaration, to get that done so we can let  
3 that go. If Your Honor's prepared to dispense with that,  
4 then that would be fine as well.

5 THE COURT: He's on the adequate assurance point?

6 MR. LIMAN: Mr. Klug is on adequate assurance, Mr.  
7 Butz is on specified receivables.

8 THE COURT: All right, Mr. Klug, would you come up  
9 to the stand, please? Would you raise your right hand,  
10 please? Do you swear or affirm to tell the truth, the whole  
11 truth, and nothing but the truth, so help you God?

12 MR. KLUG: I do.

13 THE COURT: And it's Keith, K-L-U-G, Klug?

14 MR. KLUG: Klug.

15 THE COURT: Klug, okay. So Mr. Klug, I have your  
16 June 25th, 2019 declaration in this adversary proceeding,  
17 contested matter. It pertains to the adequate assurance,  
18 363 deposit issue. Sitting here today, on July 11th, is  
19 there anything you'd like to change in it as your direct  
20 testimony?

21 MR. KLUG: No, Your Honor.

22 THE COURT: All right, so it's admitted as his  
23 direct testimony.

24 (Klug Declaration Admitted into Evidence)

25 THE COURT: And so you can step down. And then

1 Mr. Butz, are you here, also?

2 MR. LIMAN: I mispronounced. It's Mr. Butz.

3 THE COURT: Butz, Butz, Butz.

4 MR. LIMAN: Butz.

5 THE COURT: The transcript, they put it the same  
6 way three times, and they don't know what we're talking  
7 about. Raise your right hand, please. Do you swear or  
8 affirm to tell the truth, the whole truth, and nothing but  
9 the truth, so help you God?

10 MR. BUTZ: I do.

11 THE COURT: And it's B-U-T-Z?

12 MR. BUTZ: Correct.

13 THE COURT: Okay, Jeff. So I have a declaration  
14 of yours dated June 9th, which has been offered as your  
15 direct testimony on the specified receivables issue.  
16 Sitting here today on July 11th, is there anything that you  
17 would want to change in that as your direct testimony?

18 MS. MAINOO: Your Honor, one correction, the  
19 declaration --

20 THE COURT: It's really July 9th, right?

21 MS. MAINOO: Exactly. It's --

22 THE COURT: Just on the sheet it's June 9th. So  
23 anything come to you in the last two days that makes you  
24 want to change your declaration?

25 MR. BUTZ: No changes.

1 THE COURT: Okay, so it's admitted also.

2 (Jeff Butz Declaration Admitted)

3 THE COURT: So you can step down, sir. Okay. All  
4 right, so should we take a break for lunch, and then have  
5 oral argument on all of these? As far as oral argument is  
6 concerned, why don't we save the 161 for last, and do the  
7 others in the order that they came up today, and then the  
8 remaining ones?

9 MAN 1: What time would you like us back, Judge?

10 THE COURT: It's roughly 12:30, so how about 1:30?  
11 Does that make sense for people? Okay.

12 (Recess)

13 THE COURT: Please be seated. Okay, good  
14 afternoon. We're back on the record in In Re Sears Holdings  
15 Corporation et al., and the adversary proceeding/contested  
16 matter involving APA disputes. So I think where we left  
17 off, we were about to have oral argument on each of these  
18 disputes.

19 MR. FRIEDMANN: Your Honor, Jared Friedmann, Weil  
20 Gotshal & Manges on behalf of the Debtor. Just a point of  
21 clarification, for the benefit of the lawyers who have the  
22 pleasure of arguing these various disputes, is would it be  
23 Your Honor's preference for us to do one dispute at a time,  
24 such that we'll argue, they'll argue, and then we'll move to  
25 the next -- okay.

1 THE COURT: Yes, yeah.

2 MR. FRIEDMANN: Okay. We thought that was the  
3 case, but we wanted to clarify. So Your Honor, the first  
4 dispute that we'll be discussing today involves the 13  
5 additional plots of land that make up Hoffman Estates, which  
6 the -- which Transform now claims to have acquired the three  
7 lots: Lot A, Lot 1A, excuse me, Lot 2, and Lot 3, on which  
8 the Sears Headquarters itself sits, as well as some other  
9 surrounding lands, which do include, as Mr. Gallagher  
10 testified, the main entrances to the campus, and also some  
11 additional facilities for the benefit of the employees.

12 And what Mr. Gallagher's undisputed testimony also  
13 is that those three plots of land are surrounded by the main  
14 gates, and that those are -- when we went through that,  
15 that's when you're at, quote-unquote, "Sears' Headquarters".  
16 As you also heard testimony, the truth of the matter is,  
17 Debtors didn't even know about these other 13 lots until  
18 they got a letter from Cleary suggesting that ESL's  
19 position, or Transform's position was that it was acquired.

20 THE COURT: Well, you mean Debtors didn't even  
21 know --

22 MR. FRIEDMANN: They were not on the radar when --

23 THE COURT: Transform's position, or you didn't  
24 know it was divided into 16 lots?

25 MR. FRIEDMANN: They didn't know that there was

1 something beyond the gates of Sears, that was available to  
2 be sold at that point.

3 THE COURT: Okay.

4 MR. FRIEDMANN: Is, they had these three lots,  
5 which were provided by the property group, and had -- they  
6 had, excuse me, they had zoning reports and surveys showing  
7 these three lots, and there was never any reference to  
8 anything other than these three lots throughout the  
9 negotiation process. It was never part of this transaction.  
10 It was not part of the diligence. There are no documents  
11 that Transform points to that suggests that there was any  
12 discussion of anything beyond these three lots throughout  
13 the course of the transaction.

14 THE COURT: So the plot attachments to Mr.  
15 Gallagher's declaration that show 13 lots were not in the  
16 due diligence room? Or is there any testimony that they  
17 were or weren't?

18 MR. FRIEDMANN: I don't believe that there's any  
19 testimony on the record that this particular, this  
20 particular plot was in the due diligence room.

21 At the end of the day, Your Honor, effectively you  
22 have, you have a lack of the meeting of the minds here. You  
23 have Transform now, purporting to have believed that they  
24 got these extra 13 lots along with the three that were  
25 certainly sold to them, and there's nothing in the APA that



1 suggests that, there's nothing in any parol evidence that's  
2 even been pointed to that, suggests that.

3 The only thing they point to is the declaration of  
4 Jane Borden, which has several self-serving statements of  
5 someone who now works at Transform, but actually was only  
6 there for about three months before the petition date saying  
7 historically, this is what we believe 490 meant. But no  
8 other documents to support that position. The APA, on the  
9 other side is pretty clear as to what the intentions of the  
10 parties were here.

11 There was a lot of properties that were owned by  
12 the Debtors, and when we entered the APA to sell a going  
13 concern business, the key was selling Transform properties  
14 that were necessary to now operate a going concern business:  
15 stores, warehouses, without a doubt the headquarters, but  
16 not every piece of property that we own, so that's why it  
17 was clarified as to what would be provided.

18 Section 2.1(c) of the APA and Schedule 1.1(p) make  
19 clear that Transform only acquired those parcels in the  
20 Hoffman Estates development that relate to the operation of  
21 Sears' business, and that is Lots 1A, 2 and 3. The other 13  
22 lots have absolutely nothing to do with Sears' business.

23 THE COURT: Well, that's on the heading, right, to  
24 the schedule?

25 MR. FRIEDMANN: Well, it was also based on the

1 definition in 2.1(c).

2 THE COURT: Okay.

3 MR. FRIEDMANN: I'm sorry, 2.1(c) is --

4 THE COURT: Well, it's all owned real property,  
5 which includes, when you go to the definition, operating  
6 owned properties. And when you look at operating owned  
7 properties, the --

8 MR. FRIEDMANN: I said the real property described  
9 in Schedule 1.1(p).

10 THE COURT: Right, but it doesn't --

11 MR. FRIEDMANN: 1.1(p) is also referred to,  
12 entitled operating owned properties. Look, I agree --

13 THE COURT: All I'm saying is when you look at  
14 operating owned property, it doesn't say all property used  
15 in the operation of the seller's business. It says shall  
16 mean the real property described on Schedule 1.1(p).

17 MR. FRIEDMANN: That's correct.

18 THE COURT: There's nothing -- so I think you're  
19 deriving the attention from the headings, in other words.

20 MR. FRIEDMANN: Well, I'm driving from the, the  
21 whole purpose of the APA, which was to sell a going concern  
22 business, and but the readings are not an accident here.  
23 These were what the parties believed to be the operating  
24 aspects of it, and Sears' headquarters clearly is part of  
25 the operations of the business. These other 13 lots are --

1 anybody would want them, but they have absolutely nothing to  
2 do with the -- with Sears' business.

3 THE COURT: Well, they get -- they get designated  
4 leases, though, too, which they're not going to be using.

5 MR. FRIEDMANN: Judge, it was a negotiation.  
6 Certain things were specifically referenced that were not  
7 part of the business, that also were transferred via the  
8 APA. These 13 lots are not mentioned anywhere in the APA.  
9 And Your Honor, we would submit that the burden is on buyers  
10 to prove that they acquired these lots. And there is  
11 nothing in the APA, there's no evidence whatsoever that they  
12 did so.

13 As I mentioned, the only evidence they have is one  
14 person in their real estate group saying, this is what they  
15 believe it to be, and everything else is to the contrary.  
16 The fact that there is nothing in the diligence file about  
17 anything other than those three plots of land, the fact that  
18 the survey shows that the other property, Hoffman Estates  
19 development outside of 1, 2 and 3 were not included in the  
20 properties to be conveyed to Transform.

21 At the end of the day also, the APA signed, deeds  
22 are prepared, they're only prepared for the three lots, A1,  
23 2 and 3. And Transform doesn't say, well, wait a second,  
24 these are only for the three lots that are the operating  
25 properties. What about all those other 13 non-operating

1 parties? Not a word about that. Why? Because no one had  
2 the belief, and no one understood at that point that that  
3 was being transferred.

4 This only came up a month later when all these  
5 disputes arose, and every party's trying to grab that thing,  
6 and trying to make arguments that they think will allow them  
7 to get more out of this deal than they had bargained for.  
8 But one thing that was not bargained for here were these  
9 other 13 lots. It's clear from the face of the APA, and  
10 from the evidence that Your Honor heard. Thank you.

11 THE COURT: Okay. But before you sit down --

12 MR. FRIEDMANN: Please.

13 THE COURT: I asked Mr. Gallagher this, and he  
14 didn't really know, it wasn't part of his responsibility.  
15 Is there anything in the record to suggest that the benefit  
16 of the EDA arrangement goes away if you break up Hoffman  
17 Estates into the enclosed building and the easements on the  
18 one hand, and the other 13 parcels on the other?

19 MR. FRIEDMANN: There may or may not be anything  
20 in the record, especially if we look back to all the EDA  
21 issues that were in front of you. my understanding, and  
22 Michael Schein, who is the lawyer for the Village is here as  
23 well, is that the --

24 THE COURT: I'm sure that he wants to jump into  
25 this.

1 MR. FRIEDMANN: But my understanding, and correct  
2 me if I got this wrong, but that the benefits inure to the  
3 developer, which doesn't require that they own all of  
4 Hoffman Estates, just that it maintain its status as a  
5 developer, which we would be assigning that right to  
6 Transform, as soon as they assume and assign the EDA  
7 agreement, they would take over that role as a developer,  
8 and could continue to operate and be a party to the EDA  
9 agreement, holding just the three lots that were transferred  
10 to them as part of the EDA.

11 THE COURT: I guess the underlying premise of the  
12 EDA was job-related, right?

13 MR. FRIEDMANN: That's correct. It was -- we  
14 developed the EDA as a whole, with the, obviously the result  
15 of that being the creation of jobs, and certainly now the  
16 entitlement to receive the EDA is directly tied to the jobs  
17 in a given year that are retained there.

18 THE COURT: Okay.

19 MR. FRIEDMANN: Thank you. I got a thumb's up from  
20 Michael Schein for the record, so I think I probably stated  
21 that correctly.

22 THE COURT: I saw him going like that, so.

23 MR. WEAVER: Good afternoon, Your Honor. Andrew  
24 Weaver from Clearly Gottlieb Steen & Hamilton on behalf of  
25 Transform.

1 THE COURT: Good afternoon.

2 MR. WEAVER: Your Honor, it's a simple question.

3 It's whether or not these 13 plots of land are included in  
4 the phrase 490 Hoffman Estates, included in Schedule 1.1(p).  
5 That's the question.

6 And to the extent there may have been a hint of  
7 ambiguity, that ambiguity was removed this morning, when Mr.  
8 Gallagher was on the stand, and he testified under oath that  
9 yes, in fact, all 16 plots of land are categorized as 490.  
10 That is what he testified to. 490 applies, the store number  
11 490 applies to all 16 plots of land. Therefore there is no  
12 need to go beyond the plain language of the APA.

13 And that fact is underscored by the reality that  
14 everyone, everyone involved, did not understand that there  
15 were plots of land owned by Sears at Hoffman Estates that  
16 were not transferred. Mr. Meghji testified that he first  
17 became aware that certain parcels of land in Hoffman Estates  
18 that were excluded from that transaction, he learned that in  
19 March or April, after the deal.

20 Mr. Gallagher testified this morning, he first  
21 became aware, in response to the question of when he came to  
22 understand that there were lots in Hoffman Estates that  
23 Transform did not require, he understood that again, when he  
24 got the letter in March. So Your Honor, there's -- there  
25 can be no debate, because there is no ambiguity.

1 Now, what the Debtors would like to do is  
2 completely turn the language of the APA on top of itself.  
3 Now, I think Your Honor was suggesting this with your  
4 questions of Mr. Friedmann, but they derive their whole  
5 argument out of the heading of Schedule 1.1(p). That's the  
6 basis of their entire argument, and that schedule heading is  
7 operating owned properties.

8 But as Your Honor I'm sure is well aware, Section  
9 1.2(a)(5) of the APA makes very clear that the headings  
10 cannot be used to interpret the agreement. That's not a  
11 basis. What they would have us do is have an individual  
12 trial on each of these 125 properties listed, to determine  
13 whether or not they are in fact operating owned properties.  
14 And it begs the question, Your Honor, why are the three  
15 vacant lots that undisputedly were transferred on Schedule  
16 1.1(p), why are they related to the operations of Sears, but  
17 not these 13 lots in Hoffman Estates?

18 THE COURT: Well, I think that's easily answered,  
19 but I think it's probably irrelevant, as you say. It's  
20 answered, because it's the headquarters, and you can't get  
21 to the headquarters until you go through the easement. But  
22 I tend to agree with you, I don't see any requirement that  
23 there be operations or not in the reference to 1.1(p).

24 MR. WEAVER: I just want to clarify the point I  
25 was making, Your Honor, that the comparisons between the

1 three vacant lots that were transferred under Schedule  
2 1.1(p) that aren't at Hoffman Estates, there's testimony in  
3 the record that three of those properties --

4 THE COURT: Oh, other properties --

5 MR. WEAVER: In other parts of the country --

6 THE COURT: No, fine. I thought you were saying  
7 that --

8 MR. WEAVER: I wasn't talking about the baseball  
9 diamonds and the volleyball courts, no, Your Honor.

10 THE COURT: Okay, okay.

11 MR. WEAVER: But there were three admitted  
12 properties.

13 THE COURT: Yeah, yeah, I got it, I got it.

14 MR. WEAVER: Elsewhere.

15 THE COURT: I got it.

16 MR. WEAVER: Your Honor, the Debtors make a lot  
17 out of the Interlinks due diligence site. But again, Your  
18 Honor, the lack of ambiguity here means we don't even get to  
19 that point.

20 But even addressing their arguments, there's  
21 nothing in the APA that incorporates the due diligence files  
22 in the Interlinks data site. There's no basis to interpret  
23 the APA based upon what may or may not have been included in  
24 the due diligence Interlinks site. The Debtors do not point  
25 to any representation whatsoever, because none was made,



1 that the information in the database was complete and  
2 exhaustive. It is just not a basis.

3 Now, it is undisputed, Your Honor, that there were  
4 there lots at Hoffman Estates that were mortgaged. They  
5 were part of an unrelated financing transaction, and those  
6 documents are in the Interlinks data site. But the absence  
7 of any documents as it relates to the other 13 lots does not  
8 mean definitively that those lots are not 490. Mr.  
9 Gallagher admitted today that all of the lots at Hoffman  
10 Estates are 490.

11 THE COURT: See, I -- the reason I'm scrambling a  
12 little bit up here, obviously I don't have his transcript,  
13 but my notes have him saying whether the 13 are associated  
14 with 490 is not relevant, because it's not operating. I'm  
15 not sure he admits -- and in fact, he says in his  
16 declaration quite the opposite, Site 490 compared three, of  
17 16 subdivided lots. So I'm not sure --

18 MR. WEAVER: I understand. I believe the question  
19 was, the question was whether or not another store, another  
20 store number applied to those 13 lots.

21 THE COURT: Oh yes, that's true, there's no other  
22 store number, I --

23 MR. WEAVER: He said, he said 490 is in fact the  
24 store number that applies to those lots.

25 THE COURT: Well, the -- I think that the

1 difference, and I think it's an important one, is that I  
2 don't think he says 490 means the whole Hoffman Property.

3 MR. WEAVER: He may not be saying that as to  
4 what's in Schedule 1.1(p), Your Honor, but he, I believe he  
5 did say, respectfully, that --

6 THE COURT: No, he did say no store number for the  
7 rest, for the 13, but --

8 MR. WEAVER: And I believe he went a step further.

9 THE COURT: Okay.

10 MR. WEAVER: And said that 490 is a number that's  
11 used for all -- they're all encompassed within one store  
12 number. I believe that's what his testimony was, Your  
13 Honor.

14 THE COURT: See, that's, that's what -- I don't  
15 have it down that way. But is there anything in the record  
16 that shows that other property of Sears, or maybe Sears  
17 doesn't have other property, it wouldn't be a store, but  
18 that there's other property that's not characterized as a  
19 store?

20 MR. WEAVER: You mean like distribution centers,  
21 and --

22 THE COURT: Yeah.

23 MR. WEAVER: Daycare, and things like that?

24 THE COURT: Yeah.

25 MR. WEAVER: Well those, those were included, and

1 there are store numbers that do apply. Are you asking  
2 specifically whether or not they're --

3 THE COURT: Well, I think part of the argument  
4 assumes that because Mr. Gallagher testified that there's no  
5 different store number, different than 490, that corresponds  
6 to the 13 properties at issue, 13 parcels at issue, I think  
7 you're assuming that it has to be part of 490 then. But  
8 that's assuming that every property that Sears owned had a  
9 store number associated with it.

10 MR. WEAVER: Well, there is testimony to that  
11 effect, Your Honor. Ms. Borden's direct declaration  
12 testifies that the process at Sears is to assign store  
13 numbers to all owned property, and I can find that reference  
14 for you in just a moment, Your Honor.

15 MR. FRIEDMANN: Paragraph 7, (indiscernible).

16 MR. WEAVER: Thank you, Mr. Friedman, Paragraph 7  
17 in her declaration. We know they assign numbers to, store  
18 numbers to the daycare center. We know they assign store  
19 numbers to the distribution centers. Earlier you heard Mr.  
20 Barefoot this morning talking about how we resolved a lease  
21 to a warehouse that had a store number that he read into the  
22 record. That's what Sears does.

23 And Mr. Friedmann can call the testimony self-  
24 serving, but it's undisputed that Ms. Borden did testify  
25 that when she was president of Sears real estate, she

1 understood Store 490 to apply to all of the lots. It, it's  
2 a question of, what did Sears consider to be 490? I don't  
3 know what other evidence we can provide to Your Honor other  
4 than someone who was working at Sears at the time.

5 Admittedly she was --

6 THE COURT: It wasn't clear to me that she'd ever  
7 really thought about it. It's pretty clear to me that no  
8 one thought about it.

9 MR. WEAVER: Your Honor, that may be an issue as  
10 to the negotiations, there's no evidence that this issue was  
11 discussed in the tail end of negotiations. But as to the  
12 nature of how Sears operated by assigning store numbers to  
13 its properties, and the fact that the headquarters had Store  
14 Number 490 assigned to it, and that all this property at  
15 Hoffman Estates was purchased at the same time, for all  
16 those reasons, Your Honor, I think it takes -- there is no  
17 ambiguity.

18 We cannot, we cannot attempt to define each of the  
19 properties by trying to come up with some test that's not  
20 workable. Your Honor can't sit here and determine whether  
21 or not each property --

22 THE COURT: I understand that point.

23 MR. WEAVER: And so what we're left with is the  
24 contract, and the question is, is there any evidence as to  
25 what 490 means, and the evidence, I think, Your Honor, is

1 not controverted.

2 THE COURT: Okay.

3 MR. WEAVER: Just quickly as to the point related  
4 to the actual transfer of the three lots, a mistake  
5 happened, Your Honor, I mean, Your Honor can appreciate the  
6 size and scale of what was happening during this  
7 transaction. When it was discovered that all the lots were  
8 not transferred to Transform, Transform immediately notified  
9 under the provision of the APA, which provides for this very  
10 mechanism, Your Honor. So it's not as if this was not  
11 anticipated or expected. The contract contemplates a  
12 situation just like this. Thank you, Your Honor.

13 MR. FRIEDMANN: Your Honor, what's clear about  
14 Paragraph 7 that Mr. Weaver points to is that Sears assigns  
15 store numbers to stores, and distribution centers, and  
16 offices, and nothing that actually had something to do with  
17 the operations. Yes, 490 was what was assigned to the  
18 headquarters, and what 490 means just beyond it just being  
19 the headquarters I think clearly is ambiguous in this  
20 agreement. Mr. Weaver points to the fact that there are  
21 other vacant lots that are on Schedule 1.1(p). We don't  
22 dispute that. Those lots are individually identified,  
23 though, separately. So there's a -- here --

24 THE COURT: With a store number?

25 MR. FRIEDMANN: Do they have store numbers? Or

1 maybe they're together with -- or maybe they're parking lots  
2 adjacent to stores. The point is --

3 THE COURT: Well, can you show me those? Because  
4 that might be significant.

5 MR. WEAVER: (indiscernible)

6 THE COURT: Is it in 1.1(p) or somewhere else?

7 MR. WEAVER: (indiscernible)

8 THE COURT: Do you have any that --

9 MR. WEAVER: Your Honor, Ms. Borden testifies in  
10 Paragraph 19, (indiscernible) store numbers that are vacant,  
11 and those store numbers correspond to store numbers in  
12 1.1(p).

13 THE COURT: Okay. So they were assigned a store  
14 number, also.

15 MR. FRIEDMANN: Okay. But at the need of the day,  
16 Your Honor, what you have here is clear a lack of meeting of  
17 the minds, this nothing that when only three deeds were  
18 provided in connection with these stores, that there was  
19 some mistake, if 15 deeds had been provided, and one was  
20 missing, you may miss that. When there are --

21 THE COURT: But it's not a mutual mistake, right?  
22 It's just, one party thought they had a deal that was  
23 different than what is documented.

24 MR. FRIEDMANN: It's a complete lack of meeting of  
25 the minds, is that the -- all the information available, and

1 everything that was negotiated was that they were getting  
2 the headquarters, and that that was 490, and that everything  
3 that was provided in the diligence file showed those being  
4 just three properties.

5 And now all of a sudden, we have Transform coming  
6 here saying we bought three, we get the other 13 for free.  
7 And there's nothing in the APA that suggested that those  
8 were included as well. We have again, the only testimony, I  
9 don't know that it's fair, maybe it wasn't the -- the only  
10 testimony of Jane Borden, she's now a Transform employee at  
11 will. I understand why she would say that look,  
12 historically, that's the answer.

13 THE COURT: I understand, but you did have the  
14 opportunity to cross-examine her on whether there are any  
15 properties that are designated as not store properties, and  
16 didn't, and whether these are recorded in any other way, and  
17 I don't think you did that either.

18 MR. FRIEDMANN: Nothing in the APA whatsoever  
19 suggests that this was intended to include these other 13  
20 properties. Nothing in the parol evidence suggests it was  
21 supposed to include these other 13 properties. It's only a  
22 month later, after the close, that this idea comes out, that  
23 can we make an argument that this includes these other 13 as  
24 well.

25 THE COURT: Well, I think Transform's counsel is

1 right, that basically that's what Mr. Meghji and Mr.  
2 Gallagher also testified to. Because they didn't, didn't --

3 MR. FRIEDMANN: It was not, it was never --

4 THE COURT: They didn't think about this --

5 MR. FRIEDMANN: Never was there, because --

6 THE COURT: They didn't, they didn't know there  
7 were 13 other properties either, right?

8 MR. FRIEDMANN: There was never any discussion of  
9 anything being transferred than the headquarters of the  
10 three properties. So, and we went to the negotiating table.  
11 The idea was yes --

12 THE COURT: I think the testimony was different  
13 than that, which is -- when did you first realize about the  
14 13 properties?

15 MR. FRIEDMANN: Only after -- there was a lot of  
16 properties that Sears owned. Some of which was included in  
17 this transaction, a lot of which was not. Clearly included  
18 in this transaction was Sears Headquarters, and Sears  
19 Headquarters, during the course of the negotiation, has  
20 never pointed to a single document that suggests anybody was  
21 discussing Sears Headquarters has being anything other than  
22 just those three lots during the entire process.

23 We know that Transform likes parol evidence.  
24 You've got huge binders on your desk there providing that.  
25 Not a single page in there is any parol evidence showing



1 that there was a discussion that 490 was anything but these  
2 three lots.

3 THE COURT: Okay.

4 MR. FRIEDMANN: Thank you, Your Honor.

5 MR. WEAVER: Your Honor, the reason that it was  
6 not discussed is because it was understood. The people who  
7 run Sears, who were operating Sears --

8 THE COURT: Well, we don't have any parol evidence  
9 about the negotiations, right?

10 MR. WEAVER: I don't think it was negotiated, Your  
11 Honor. I think --

12 THE COURT: It's just made out in the schedule.

13 MR. WEAVER: It's made out in the schedule. In a  
14 transaction like this, you put together schedules -- the  
15 seller knows they're selling, and the buyer knows they're  
16 buying, that's why you do it. The fact that we're even  
17 having this discussion indicates why the path that the  
18 Debtor wants to go on is not workable, and it is not in the  
19 spirit or in the plain language of the APA.

20 THE COURT: Okay.

21 MR. WEAVER: Thank you, Your Honor.

22 THE COURT: All right, so the first of the  
23 disputes between Transform, the buyer, and the Sears Debtors  
24 over the meaning and enforcement of their asset purchase  
25 agreement as amended pertains to Section 2.1(a) of the

1 agreement, which lists among the transferred assets to  
2 Transform all -- this is a defined term -- owned real  
3 property.

4 In the definitions section of the agreement, 1.1  
5 owned real property includes, or is defined as one the GOB-  
6 owned stores, and two, the operating owned properties. And  
7 the operating owned properties are defined as the real  
8 property described in Schedule 1.1(p), including in each  
9 case all the right title and interest of seller and the  
10 subsidiaries to all improvements located thereon, and other  
11 easements, rights and interest appurtenant thereto, and any  
12 associated rights to parking.

13 So notwithstanding the heading, owned -- I'm  
14 sorry, operating owned properties means the property  
15 described in Schedule 1.1(p). The parties dispute whether  
16 Schedule 1.1(p), when it lists Store Number 490, Hoffman  
17 Estates in Illinois, means all of the 16 parcels of land  
18 comprising the generic term, Hoffman Estates, or instead,  
19 Sears Headquarters and the two adjacent parcels that have  
20 the entrances, as well as some land that employees can use  
21 for playing baseball, and basketball, and some other,  
22 perhaps outbuildings.

23 The Debtor contends that based on the headings,  
24 and an unstated, that is, not stated in the agreement, but  
25 implicit overall purpose, that Transform was buying Sears'

1 operating assets, the vacant land that's not included in the  
2 three parcels that I've just mentioned can't be meant by the  
3 reference on Schedule 1.1(p).

4           There are a number of problems with that analysis.  
5 First, as I said, the headings don't count in the agreement.  
6 Second, Transform bought property other than property that  
7 was going to be used as an operating part of its business,  
8 including as set forth on 1.1(p), as set forth in the  
9 uncontroverted testimony of Ms. Borden. Even if I were to  
10 read an overall purpose into the agreement, it's belied by  
11 those facts.

12           So I believe the issue comes down to simply what  
13 did the parties mean, when they put Store Number 490,  
14 Hoffman Estates, Illinois on Schedule 1.1(p)? Based again  
15 on the uncontroverted testimony of Ms. Borden, and her  
16 declaration, including Paragraph 7, it appears to me that  
17 Sears denominated all of its properties, not just stores,  
18 but all sorts of other properties, including as set forth on  
19 Exhibit 1.1(p), other vacant properties, nearly vacant land  
20 as a store.

21           Given that uncontroverted fact, it appears clear  
22 to me and unambiguous that by designating the property here  
23 as Store 490, Sears meant the entire Hoffman Estates  
24 property, and not just the three parcels that appeared in  
25 the Interlink materials in the due diligence site, or

1 otherwise. The Debtors obviously had as much information  
2 about their properties as Transform did, and certainly could  
3 have negotiated a carveout from Store 490 to include the  
4 other 13 properties, if they wanted to, but they didn't.

5 It is also the case that the Debtors' witness, Mr.  
6 Gallagher, testified that at least that no other store  
7 denomination was given for the other 13 properties, and  
8 certainly that, when combined with Ms. Borden's testimony,  
9 supports my ruling. My ruling is also somewhat supported by  
10 the fact that the Debtors' schedules did not break out the  
11 Hoffman Estates properties, but rather scheduled them as  
12 land, and a building. I don't believe that rises to the  
13 level of estoppel, as argued in the briefing by Transform,  
14 but it does highlight that Sears looked at this property as  
15 a whole.

16 I say it doesn't rise to the level of estoppel,  
17 because the function of schedules is to reasonably identify  
18 the assets to parties in interest, and to give parties a  
19 proper opportunity to investigate the Debtors' schedules to  
20 see whether they're accurate. See generally, In Re Frontier  
21 Insurance Group, Inc. 585 B.R. 685 at 701 through 02, Bankr.  
22 S.D.N.Y. 2018, and the cases and authorities cited therein.

23 But it appears that again, based on how the  
24 parties consistently dealt with their real property, how it  
25 was denominated here, and the plain language of the

1       operative provisions of the agreement, that whether either  
2       side thought that Transform was acquiring the entire Hoffman  
3       Estates set of 16 properties, the agreement said it did, and  
4       accordingly, it did.

5               So I think the next issue, and I've lost my page,  
6       there we go, is the specified receivables point?

7               MR. FRIEDMANN: Yes, Your Honor. Your Honor, the  
8       issue with specific receivables stems from the buyer's  
9       desire to recalculate, with another financial advisor, the  
10      value of the assets of the specified receivables it received  
11      at close in a manner different from the way the company's  
12      own accounting systems calculated the value of the specified  
13      receivables at close. Mr. Tavakoli testified he actually  
14      wasn't exactly sure what specified receivables are defined  
15      as under the APA, and we'll leave that at that.

16              But it is important for us to know what specified  
17      receivables are on the APA, and they're defined to mean the  
18      accounts receivable set forth in Schedule 1.1(k), and  
19      Schedule 1.1(k) lists out about 30 specific categories of  
20      receivables that correspond to exactly how those receivables  
21      were kept in Debtors' accounting systems. That's what  
22      listed in 1.1(k), and the amounts that are listed in 1.1(k)  
23      was the book value of those accounts at the time of the  
24      execution of the APA.

25              These, as the undisputed testimony before you

1 shows, that methodology to calculate that book value is  
2 exactly the same methodology that Debtors used prepetition  
3 when it prepared its audited financials, when it reported to  
4 the SEC, and most importantly, it was the methodology that  
5 was used when 1.1(k) was set as the peg to which the Debtors  
6 had to deliver a certain amount of specified receivables in  
7 order to avoid what the APA refers to as a specified  
8 receivables shortfall.

9 And the peg was set at a book value of \$255.2  
10 million in order to avoid a specified receivable shortfall,  
11 meaning if they delivered more than that, that simply would  
12 inure to the benefit of Transform, who would receive a great  
13 amount of specified receivables, but if they delivered less  
14 than that, it would be offset against other liabilities,  
15 such as severance and 503(b)(9) claims.

16 The buyers had an opportunity to diligence these  
17 accounts in advance of the execution of the APA, of the  
18 testimony of Mr. Kamlani shows during negotiations of the  
19 APA, the Debtors provided with the preliminary list of the  
20 ten-current amounts in the accounting systems of the  
21 unencumbered receivables as early as January 6th. It's in  
22 Kumlani's transcript, 67, 813. The schedule reflected the  
23 exact same 30 categories that would eventually be reflected  
24 in Schedule 1.1(k). At that point, they had a book value in  
25 of an excess of \$330 million, and that's shown in Joint

1 Exhibit 86.

2 The Debtors also expected that the specified  
3 receivables would have varying recovery letters, recovery  
4 levels, excuse me, which as Mr. Riecker explained, was  
5 understood by all parties as they discussed this, and was  
6 input with diligence. There's no belief that a particular  
7 receivable would stay the same during the 25 days between  
8 the execution of the agreement and the closing, because  
9 every day new receivables come in, other receivables are  
10 satisfied.

11 On January 6th, when these initial specified  
12 receivables were presented to ESL at the time, they were  
13 presented with recovery rates ranging from zero percent to  
14 90 percent, and an overall blended recovery rate of 44  
15 percent. The bottom line was, no one expected if you  
16 received \$255.2 million of specified receivables, that you'd  
17 be able to turn around and collect \$255.2 million. These  
18 were just values on the books, but some of them were known  
19 to be much more likely to recover much less.

20 And that's why, as both Mr. Riecker and Mr.  
21 Kamalani testified, buyer was given the opportunity  
22 (indiscernible) and in fact did diligence, these specified  
23 receivables, in the weeks leading up to the execution of the  
24 APA. In fact, as Mr. Riecker testified, the buyer consulted  
25 with Debtors regarding the details of the 30 ledger

1 accounts, as well as what was actually in those accounts, so  
2 not just what the numbers were on a given day, but what it  
3 was that made up those accounts, and the basis of the  
4 estimated recoveries, according to Debtors.

5 And based on that diligence, Transform accepted  
6 the list, which is then reflected in 1.1(k), at that point,  
7 at the time of execution, having a book value of \$255.2  
8 million, which as I mentioned before, is where the shortfall  
9 threshold was set at. 25 days later from the execution, we  
10 get to the closing, and at that point, Debtors delivered all  
11 of the then-outstanding receivables in those exact same 30  
12 categories, which at that point had an aggregate book value  
13 of around 292,083,182.

14 As I mentioned before, everything went to  
15 Transform, even though it was more than where the threshold  
16 amount was set, and as Mr. Riecker testified at his  
17 deposition, buyer gave everything. It wasn't a situation  
18 where they kept certain receivables for themselves, because  
19 there were so many. Everything that was those 30 accounts,  
20 which was delivered, which was exactly what the APA  
21 required.

22 All of the Debtors' calculations of the value of  
23 the specified receivables, both when the \$255.2 million peg  
24 was set, and when they calculated the 292 million and change  
25 that was delivered at closing, all came directly from the



1 Debtors' accounting systems.

2 THE COURT: Well, can I interrupt you?

3 MR. FRIEDMANN: Please.

4 THE COURT: I mean, maybe you're just about to get  
5 to this. The definition of the specified receivables does  
6 say the accounts receivable, and then it has reference to  
7 Schedule 1.1(k). And I understand you've been addressing  
8 Transform's argument that 1.1(k) has to mean you have to  
9 deliver the specific numbers by each category on 1.1(k).  
10 But it also says accounts receivable.

11 Mr. Tavakoli's declaration says that two chunks of  
12 accounts, so-called accounts receivable weren't accounts  
13 receivable, and he separates them into 28.6 million, which  
14 include 12.3 million of accounts that were actually  
15 collected before the closing, so they couldn't be  
16 receivable, and then a number, another 16.3 million that are  
17 just not -- they're in company accounts, and things like  
18 that. so that's one group, and then the -- and I frankly am  
19 fairly sympathetic with that argument, because it's hard to  
20 see how those could be accounts receivable.

21 The second point is, there's another 54, 57.4 that  
22 is not properly charged, because it's in respect to already-  
23 received CIA inventory. So can you address both of those  
24 two points?

25 MR. FRIEDMANN: Yeah, I think I can address them

1 together, Your Honor, it's that these were accounts  
2 receivable as they were kept by the company prepetition,  
3 post-petition. They had specific lines in their accounting  
4 systems, and some of them contained, for better or for  
5 worse, what were called accounts receivable, but really had  
6 no value.

7 THE COURT: Well, no, it's one thing to say it's  
8 not collectable. By analogy, credit card issuers will  
9 report a debt to the credit reporting agencies as zero  
10 dollars. In their nomenclature, that doesn't mean they  
11 wouldn't -- off, that they're not going to be able to  
12 collect it. It just means that they think that it's only  
13 worth zero dollars. That's not what I'm focusing on. I'm  
14 focusing on whether these items were even accounts  
15 receivable, since that's part of the definition.

16 MR. FRIEDMANN: They were considered accounts  
17 receivable in the finance reporting that Debtors did  
18 prepetition, and its audited financials by Deloitte, and in  
19 its SEC reporting. There was nothing that when the company  
20 went into petition that we started doing differently, and  
21 all of a sudden things that were not considered accounts  
22 receivable before pre-petition we started calling --

23 THE COURT: Well --

24 MR. FRIEDMANN: So, and the idea was that we  
25 understood that some of these were real receivables, some of

1       them might not have been. And the idea was look, we're  
2       giving everything. There are certain receivables, the  
3       specified receivable's a bit of misnomer, because there are  
4       receivables that actually were specified. This is really  
5       everything else, it just happened to all be specified and  
6       (indiscernible). You have all these other accounts. Some  
7       are good, some are bad, some are unclear.

8               THE COURT: Is there anywhere where the APA says  
9       either of these two things, this is A, it's determined as  
10      per the company's reporting, or as per the due diligence  
11      materials you received? Or alternatively, B, these are  
12      specified accounts receivable and we all know that some of  
13      them aren't even accounts receivable?

14             MR. FRIEDMANN: Well, that was the purpose of  
15      having the Schedule 1.1(k), and of not just giving that  
16      schedule, but having that whole diligence process before.  
17      And keep in mind here, the individual diligence in the  
18      company are the same individuals who actually ran the  
19      company prepetition.

20             So they had some background here that a third  
21      party might not have. I could understand if it was a real  
22      third-party buyer who all of a sudden came in here and said  
23      well, you guys are calling these accounts receivable. These  
24      are the same people who owned the company beforehand, and  
25      who were -- one of whom was the CEO, one of whom was on the

1 audit committee when these were considered accounts  
2 receivable.

3 But again, we didn't say take our word for it.  
4 They were diligence, there was multiple phone calls and  
5 meetings to understand the details of what was in these  
6 things, to understood, some of them were worth something,  
7 some of them were not, that's why --

8 THE COURT: Did that include the Debtors pointing  
9 out that these debts have already been paid?

10 MR. FRIEDMANN: My understanding is that any  
11 diligence questions that were asked, and there were a lot of  
12 them, mostly led by Mr. Kamalani, everything was responded,  
13 to the best of the available information we had. They had  
14 full access, whereas E&Y is not allowed to talk to Mr.  
15 Riecker, for some reason. That was not the case here, as  
16 they had full access to the CFO and everybody else in our  
17 accounting department to get information, as well as  
18 obviously through M-III.

19 THE COURT: But again, the definition, specified  
20 receivables, shall mean the accounts receivable, set forth  
21 on Schedule 1.1(k).

22 MR. FRIEDMANN: Right, accounts receivable is not  
23 defined here. This is not a defined term, accounts -- it's  
24 simply defined as whatever's on 1.1(k), so --

25 THE COURT: But it's preceded by the phrase,

1 accounts receivable.

2 MR. FRIEDMANN: Correct.

3 THE COURT: And I think people normally view an  
4 account receivable as not something that's already been  
5 paid.

6 MR. FRIEDMANN: I think that's a fair point, Your  
7 Honor. For the purpose, though, of 1.1(k), there were  
8 these, all these accounts which were kept by the company, as  
9 accounts receivable, for better or worse. The idea was at  
10 closing, you're getting all of them. We don't think it's  
11 worth anywhere near 255.2 --

12 THE COURT: I get that completely, but I'm having  
13 a hard time seeing that bar get included, providing  
14 something that wasn't an account receivable.

15 MR. FRIEDMANN: Look, whereas on Hoffman Estates,  
16 there clearly was no meeting of the minds, because there  
17 wasn't perfect information between the two, here there was  
18 perfect information. Now, the perfect information may have  
19 led to the fact that we're calling things accounts  
20 receivable that aren't really accounts receivable, but  
21 everybody knew what they were. What everyone --

22 THE COURT: Where is that in the record? Is there  
23 any admission, any disclosure that items on 1.1(k) included  
24 amounts that had already been collected?

25 MR. FRIEDMANN: First of all, Your Honor, the

1 other thing I can say is that the nature of these also,  
2 amounts that may have already been collected could be not  
3 collected one day, but then collected the next day, and  
4 there is a lag time in between some of these.

5 So some of the reasons that there are issues here  
6 is that the way in which the company processes information,  
7 there are lag times that get cleared up at the end of every  
8 month. So you do end up, given the particular day you  
9 happen to pick, that you'd have that on certain days, and by  
10 the end of the month, they've cleared.

11 THE COURT: Well, but if you go to, if you go to  
12 Schedule 1.1(k), and you can just pick any of these, well,  
13 let's use the Tavakoli 12.3 million. Well, let's use the  
14 intercompany receivable ones first. Where on 1.1(k) does  
15 that fall in? Is that other receivables? There's this  
16 India Entities, and Sears Holding Management Corporation,  
17 \$9.993071. Is that -- does that show up on Schedule 1.1(k),  
18 that type of intercompany obligation?

19 MR. FRIEDMANN: I don't know the standing here  
20 right now, Your Honor, I couldn't honestly answer that  
21 question for you. From our perspective, is these were  
22 accounts that were -- the amounts were fluctuating, the  
23 actual accounts were always the same, and the quality of the  
24 accounts varied greatly. And when is any (indiscernible) --  
25 some of them -- and again, (indiscernible) --

1 THE COURT: I get your point about the quality. I  
2 don't really have a problem with that. but I don't --

3 MR. FRIEDMANN: The only --

4 THE COURT: Frankly, I, maybe --

5 MR. FRIEDMANN: The only --

6 THE COURT: Maybe, I'm missing something here. I  
7 thought what you were going to do is say yes, we agree, some  
8 of these aren't accounts receivable, because they have been  
9 paid. But maybe some of these others really are properly on  
10 1.1(k), because A, they haven't been paid, and B, it's not  
11 double-counting, and they're owed.

12 MR. FRIEDMANN: I think maybe the point is this,  
13 Your Honor. Debtors didn't pick and choose what would go on  
14 1.1(k). It wasn't like we said all right, these are real  
15 accounts receivable, so we're going to put them on 1.1(k),  
16 and these we all know are not real accounts receivable, so  
17 we're not going to include them. We took everything that  
18 was left after we had divvied up what was going to  
19 Transform, and everything that was left went on the  
20 schedule. For better or worse, it went on here.

21 THE COURT: Okay, so I'm going to go back to my  
22 prior question, then. Did -- is there anything in the  
23 record to show that Transform knew that everything that was  
24 left as laid onto Schedule 1.1(k) included, and it would be  
25 included in the individual amounts, you know, because it was

1       pegged to a point when those were actually accounted for  
2       accounts receivable. So did that include accounts  
3       receivable that had already been paid?

4               MR. FRIEDMANN: So I think the January 6th  
5       presentation, which is a joint exhibit. It is Exhibit, I  
6       think it's Page 6, I believe.

7               THE COURT: Okay.

8               MR. FRIEDMANN: It's Page 6, I believe, of this  
9       exhibit, or actually it's -- well, based on the Bates  
10      Number, it's 7, but it's 6 in the presentation. The top  
11      line says other receivables, preliminary schedule and  
12      estimated recovery value.

13              THE COURT: Okay.

14              MR. FRIEDMANN: Maybe other receivables would have  
15      been a better term to have made its way into the APA,  
16      instead of accounts receivable.

17              But again, this is showing you the information  
18      that was provided initially, for each of the accounts that  
19      were, as I said, left over, that accounts created by Sears  
20      prepetition and which our view was that we were going to  
21      give them everything we had. Whatever else was in the  
22      account systems, which we inherited. We didn't create these  
23      accounts. We inherited them from prepetition Sears, and we  
24      knew that there were issues, as were described in  
25      description and comments here, and following this



1 presentation, we provided an opportunity for the buyer to  
2 further diligence this.

3 So if your question is, did they absolutely know a  
4 particular fact, the answer is if they didn't know, they  
5 certainly should have known. They had every opportunity in  
6 the world to ask about these, and if there was a particular  
7 account that they believed, these are not really accounts  
8 receivable and don't belong on this list, the time to have  
9 said that was before we signed the APA, not after the deal  
10 closed.

11 And that didn't happen. They understood what  
12 these receivables were, because we inherited them from the  
13 same people who ran the company beforehand. They diligenced  
14 this, they knew exactly what they were getting, and they  
15 accepted it. And then we ultimately provided to them at  
16 close all of those exact same accounts, for better or worse,  
17 in an amount that was above the threshold that we were  
18 required to provide.

19 All right, and by the way, it was only on February  
20 25th that we finally got a letter saying wait a second,  
21 there are some issues with these accounts. At close,  
22 everybody understood that it was exactly what we had looked  
23 at, 25 days later -- 25 days earlier, excuse me, that  
24 everything was provided. These are the accounts, here they  
25 are, they're yours now, and there's more book value to them

1 now than there was 25 days later. It could have gone up or  
2 down; it happened to have gone up.

3 THE COURT: How can you give book value to an  
4 account that's been paid?

5 MR. FRIEDMANN: It's the book value that was in  
6 their accounting system at the time. And again, it's -- we  
7 did not create this. We inherited. This is exactly the way  
8 it was maintained, when these same accounts were being used  
9 to report the financials audited by Deloitte. It was the  
10 same values that were given, in order to report to the SEC.

11 We accepted it. We said look, we think there are  
12 issues here, take a look, ask the questions you want to ask.  
13 Get comfortable with what you're getting here, but buyer  
14 beware, they're your accounts.

15 THE COURT: Okay, are there any other arguments  
16 counter to the analysis in the Tavakoli declaration  
17 pertaining to this issue? For example, Mr. Tavakoli says  
18 that the 9.99 million of accounts receivable relating to an  
19 intercompany transaction between Sears India Entities and  
20 Sears Holding Management Corporation is not a valid  
21 receivable because it does not relate to any external third-  
22 party receivables. I actually didn't see a carveout for  
23 non-third-party receivables, for example.

24 And it seemed in the briefing that you were  
25 arguing that the 57.4 million relating to the CIA inventory

1 really wasn't double-counting, and that should be treated as  
2 an account receivable. Are you giving up on those  
3 arguments? Are you giving up on those arguments, or are you  
4 still making those arguments?

5 MR. FRIEDMANN: Your Honor, I understand that  
6 there's -- and this is, again, a historic issue in their  
7 accounting systems, that when items are received, you know,  
8 a cash payout in advance, there's a receivable created on  
9 the books when the cash is paid out, and the receivable  
10 doesn't always get extinguished right away. It sometimes it  
11 takes a while to, and maybe not at all, because they're not  
12 able to match it up right away.

13 Now, Mr. Tavakoli have the benefit of spending  
14 1500 hours going through this stuff to find things that  
15 frankly, in the 25 days between the execution of the APA and  
16 the close, was not ever going to happen, but I think the,  
17 for us the --

18 THE COURT: I'm sorry. I missed that part.

19 MR. FRIEDMANN: That he was able to, with the  
20 benefit of four months and unlimited resources and 1500  
21 hours, he was able to identify things and find these issues  
22 that in the short period of time we had we didn't.

23 But I think the key is that whatever problems  
24 there were with these accounts at close, were the same  
25 problems with those accounts just 25 days earlier. So, you

1 know, if we had a car that only had three wheels and you  
2 looked at, you say it has three wheels, and when we  
3 delivered it, it still only had three wheels 25 days later,  
4 it's exactly you bargained for and agreed to, is that you  
5 knew it had problems. It wasn't -- this was not a brand-new  
6 car. These weren't receivables. They had a lot of issues.  
7 We told them they had issues. But the point was, we're  
8 going to give you everything.

9 And the key for all this was we just want to make  
10 sure, and it's the expectation of the parties that right  
11 now, as of the signing, these accounts, for better or worse,  
12 are worth \$255.2 million on your books. We want to make  
13 sure that 25 days later, nothing's changed, and we still are  
14 getting \$255.2 million. What we don't want is you to tell  
15 us these accounts totaled \$255.2 million at execution, and  
16 then we get to close, and you say, oh, now we only have \$100  
17 million, so those could be (indiscernible) on everything.

18 So, the whole point of this provision was, you're  
19 getting everything. With respect to these accounts, at  
20 execution, it's \$255.2 million, whatever they are. And we  
21 want to know that 25 days later, there's no games getting  
22 on. We're getting exactly what we expected to buy. And if  
23 we get less, then we get a dollar per dollar shortfall  
24 payment. And that's what this is.

25 It wasn't about are these good accounts, are they

1 bad accounts, are they real receivables, are they not real  
2 receivables? It was just a way of pegging what we had at  
3 execution to make sure that we operated in the ordinary  
4 course and they got the same thing 25 days later when we  
5 sold the company. It turned out we had even more specified  
6 receivables than we did at the time of the execution.

7 There's a lot of arguments that are raised by the  
8 buyer about the fact that the -- well, the \$297 million  
9 amount is obviously more than the \$255 million amount, and  
10 the amounts in the individual accounts changed.

11 There is nothing in the APA whatsoever that  
12 suggests that any of those individual line items are  
13 expecting the exact same amount. And frankly, as Mr.  
14 Riecker testified, there would be no expectation that that  
15 could ever happen. As these numbers fluctuate all the time,  
16 they're going to go up, they're going to go down, which is  
17 why the parties didn't negotiate when we said you'd get  
18 exactly at execution what you get at sale. We didn't  
19 negotiate it at each individual line. We negotiated for an  
20 aggregate amount of \$255.2 million worth of book value.

21 I think one of the other key things to point out  
22 is that in terms of getting what they expected to get, the  
23 June 6th presentation that I was just showing Your Honor  
24 estimated an aggregate recovery of about 44 percent on  
25 these.

1 Mr. Tavakoli's declaration suggests they've  
2 already collected over \$85 million on these receivables.  
3 So, they are already up to collecting 33 percent on that,  
4 which demonstrates that it's what we told them it was.  
5 There was no smoke and mirrors here. There was nothing to  
6 suggest these are something they aren't. Exactly what we  
7 told them and exactly what we suggested would be their  
8 recovery is bearing out, that they're already at 33 percent  
9 recovery on these receivables.

10 Unless Your Honor has any other questions, we rest  
11 on that.

12 THE COURT: I asked Mr. Tavakoli this on the  
13 payments, whether in fact all of these instances in his  
14 declaration where he says there's been payment -- I asked  
15 him to confirm whether the payment was to Sears or is being  
16 held by Transform. And his answer was to Sears. Do you  
17 have anything to dispute that?

18 MR. FRIEDMANN: These are payments, the specified  
19 receivables that they're collecting?

20 THE COURT: Right. Well, for example, there was  
21 an 8.87 receivable balance, and on May 14, 2019, 3:30:13  
22 Jennifer Joye from the Treasury Group confirmed that two  
23 wires were received in account -- gives the number. On  
24 February 6, it received \$6.87 million, and on February 2, it  
25 received \$2 million.

1 So, the it, I'm assuming is Sears. And I asked  
2 Mr. Tavakoli that, as opposed to Transform.

3 MR. FRIEDMANN: I'm looking over to my client to  
4 track these things closer than that, Your Honor.

5 THE COURT: It's on Page 12. There's a similar  
6 thing right below there, \$2.111 million is deposited in  
7 Sears Roebuck National Claims Center account at Bank of  
8 America, but not recorded in a timely manner. You know,  
9 again, I don't know if -- I'm assuming, based on his  
10 testimony, that this money is all in Sears' possession.

11 MR. FRIEDMANN: When you're saying Sears, you mean  
12 Debtors?

13 THE COURT: Yeah.

14 MR. FRIEDMANN: Okay.

15 THE COURT: Yeah.

16 MR. FRIEDMANN: Give me one moment  
17 (indiscernible).

18 Your Honor, we don't have information to doubt  
19 what Mr. Tavakoli is testifying to. I think the issue is  
20 that, again, this is a point in time, so there is --

21 THE COURT: And no, I understand your argument.  
22 I'm just --

23 MR. FRIEDMANN: Well, there's lag on both sides  
24 is. What I want to be clear about is that there are some  
25 things that are not Accounts Receivable anymore; they've

1 already been collected. There are also things that aren't  
2 yet reflected in there that end up in there as well  
3 eventually. So, there is --

4 THE COURT: Well, I'm sorry. Let me make sure I  
5 understand that. Are you saying that the \$292 million that  
6 was certified at closing could actually grow?

7 MR. FRIEDMANN: It could be understating what  
8 actually ends up being in those accounts.

9 THE COURT: How is that?

10 MR. FRIEDMANN: It could -- it's an accounting  
11 process. It's not -- again, we're not counting everything.  
12 The accounting process has lag in it. As things come in  
13 and, you know, they're matched up and ordered. And  
14 therefore, there's always some lag in terms of what  
15 receivables are in and what comes out.

16 So, yes, is that there are some things that are  
17 stale at any given point in time, and there are some things  
18 that are not yet reflected on any given point in time.

19 MS. MAINOO: Objection, Your Honor. Mr. Friedmann  
20 is arguing based on information that's not on the record.

21 THE COURT: Yeah, I don't -- where do you get that  
22 from? I mean, there is a certification in closing that  
23 there was \$292 and change.

24 MR. FRIEDMANN: And that is what -- at closing,  
25 that is what the current records reflected.



1 THE COURT: So --

2 MR. FRIEDMANN: An hour later -- or a day later is  
3 probably a better example -- all those numbers shifted.

4 THE COURT: Well, but --

5 MR. FRIEDMANN: And some of them shifted up and  
6 some of them shifted down.

7 THE COURT: The amount owing, how would that go  
8 up?

9 MR. FRIEDMANN: The amount being owed to Sears?

10 THE COURT: Yeah.

11 MR. FRIEDMANN: I assume new receivables being  
12 created that were not yet recorded, and therefore not yet  
13 reflected in that particular accounting entry and accounting  
14 line.

15 THE COURT: So, are you saying that the Debtors  
16 should get credit for those?

17 MR. FRIEDMANN: No.

18 THE COURT: As long as they --

19 MR. FRIEDMANN: We're not -- not at all. We're  
20 saying that it's -- this was based on two snapshots. There  
21 was a snapshot of execution and a snapshot it close. Both  
22 of them had (indiscernible). But those are the two  
23 snapshots using the exact same accounting methodology,  
24 again, for better or worse, on both days. And that's the  
25 way we can ensure that what was promised at execution is

1 what was delivered at closing. That was the purpose of all  
2 this, is here are these accounts, there are lags, there are  
3 issues. But here's what they are as of today, snapshot.

4 And when we do another snapshot 25 days from now  
5 at close, we have an obligation as the Debtor to seller here  
6 to make sure that the aggregate value of those accounts,  
7 whatever might be in there, is at least \$255.2 million.

8 THE COURT: Let me ask you a different question.  
9 If Sears generated and Accounts Receivable preclosing that  
10 didn't appear in the 292 calculation because it hadn't hit  
11 the books yet, and then there's a payment on it post-  
12 closing, who does that go to?

13 MR. FRIEDMANN: It would go to Transform.

14 THE COURT: Okay. And you're saying that if --  
15 that simply because there was a post-closing payment on it  
16 on an account receivable that had been on your list --

17 MR. FRIEDMANN: They were getting the benefit of  
18 those receivables.

19 THE COURT: No, no, let me finish.

20 MR. FRIEDMANN: I'm sorry.

21 THE COURT: The closing was when? What was the  
22 date?

23 MR. FRIEDMANN: 12:01 AM on February 11th was the  
24 closing date.

25 THE COURT: February 11th? Okay. So, these are

1 all payments before the closing date that are referred to  
2 here in Mr. Tavakoli's declaration.

3 MR. FRIEDMANN: That's our understanding that's  
4 what he's referring to.

5 THE COURT: All right. So that --

6 MR. FRIEDMANN: Yes, a receivable that was created  
7 before that closing date. But the payment didn't come  
8 through until after 12:01 on February 11th?

9 THE COURT: Right.

10 MR. FRIEDMANN: Absolutely, it belongs to  
11 Transform. That's what they acquired --

12 THE COURT: Okay. But they're not --

13 MR. FRIEDMANN: -- is the --

14 THE COURT: But they're not --

15 MR. FRIEDMANN: -- accounts receivable.

16 THE COURT: -- saying that that reduces the  
17 specified receivables. They're just saying that payments  
18 before the closing date reduce the specified receivables.

19 MR. FRIEDMANN: They are saying that there are --  
20 some of these accounts on February 11th didn't reflect  
21 payments from February 6th, which they were able to identify  
22 --

23 THE COURT: Right.

24 MR. FRIEDMANN: -- in May.

25 THE COURT: Right.

1 MR. FRIEDMANN: I'm sure that is accurate. I'm  
2 sure that there are things that were not reflected from  
3 February 6, which I think was a Thursday or Friday, until --  
4 on the books on Monday morning at 12:01. And likewise --

5 THE COURT: So, what's the rationale for letting  
6 the Debtor get both the money and the credit for the  
7 accounts receivable?

8 MR. FRIEDMANN: Because likewise, the same thing  
9 as with -- on the date of execution, the same issue arose.  
10 If they had studied the -- you're applying two different  
11 methodologies. If you apply the same methodology Mr.  
12 Tavakoli did to the specified receivables as of the  
13 execution date, he'd be finding all the same issues, and  
14 then he'd be getting even again.

15 The problem is applying two different  
16 methodologies here. You're not comparing apples and apples  
17 anymore. So, yes, he's going to find the same kind of thing  
18 where there's going to be a receivable that was, you know, a  
19 couple days before the execution date. It wouldn't be  
20 reflected there yet.

21 And our position is that in order to be held to  
22 delivering what we promised to deliver, you've got to  
23 measure it the same way. You can't measure it based on the  
24 accounting books and records for one of those two poles, and  
25 then go to the other pole and say here's a whole new

1 methodology for seeing if you did the same thing. It just  
2 doesn't work.

3 THE COURT: So, you're saying that if I were to  
4 adopt Mr. Tavakoli's methodology, then you would be entitled  
5 to say, well, all those pre-closing receivables should go  
6 into the 292 calculation?

7 MR. FRIEDMANN: We wouldn't be entitled to  
8 anything.

9 THE COURT: Well, I'm just saying, if I adopted  
10 his methodology.

11 MR. FRIEDMANN: If we took his methodology, it  
12 would need to be applied to both moments in time.

13 THE COURT: Right.

14 MR. FRIEDMANN: And then it would -- we would get  
15 the benefit of it on the execution analysis, the same way  
16 Transform is trying to take the benefit of it on the close  
17 analysis.

18 Your Honor, my partner, Mr. Schrock, points out a  
19 fuller answer to a question you asked me before. So, for  
20 the benefit of the Court, you asked about whether or not  
21 there was anything else regarding what Transform should've  
22 known about the quality of the accounts and things of that  
23 nature. Section 6.13 discusses financial statements and  
24 discusses -- I'm not going to read the entire portion into  
25 the record -- but it talks about the fact that the

1 consolidated financial statements of Sears Holding Company  
2 and its subsidiaries had been prepared in accordance with  
3 (indiscernible) and consistently applied during the periods  
4 and dates involved. And it goes on from there to talk about  
5 it complying as to form in all material respects with  
6 applicable accounting requirements in the published rules  
7 and regulations of the SEC, with respect thereto, and  
8 (indiscernible) present in all material respects in the  
9 consolidated claims all positions of Sears Holding Company  
10 and its subsidiaries, and of the dates thereof and the  
11 consolidated results and operations and cash flows for the  
12 periods then ended.

13 Then 6.15 makes clear that there are no  
14 representations or warranties, except for the  
15 representations or warranties contained in this Article 6  
16 and in the other transaction documents, as applicable.  
17 Neither sellers nor any other person on behalf of seller  
18 makes any express or implied representation or warranty to  
19 respect to sellers, its subsidiaries, the business, the  
20 acquired assets, the assumed liabilities. This transaction  
21 is with respect to any information provided by or on behalf  
22 of sellers to buyer, and seller disclaims any other  
23 representations or warranties, whether made by seller or an  
24 affiliate of seller, or any of their respective officers,  
25 directors, employees, agents or representatives, except for

1 the representations and warranties contained in this article  
2 and in the transaction documents applicable.

3 And then under Section (b), there's clearly  
4 another briefing which disclaims all liability and  
5 responsibility for the representations, warranties,  
6 projections, et cetera, and statements made.

7 So, I just wanted to give the -- point the Court  
8 to those two provision as well in connection with your prior  
9 question.

10 THE COURT: Okay.

11 MS. MAINOO: Good afternoon, Your Honor, Your  
12 Honor. Abena Mainoo, on behalf of Transform.

13 As Your Honor stated, the definition of specified  
14 receivables begins with, "Specified receivables shall mean  
15 the accounts receivable." Debtors now seem to be making  
16 admissions that they were calling things accounts receivable  
17 that aren't really accounts receivable. But that's not the  
18 deal that Transform made.

19 Debtors' argument suggests that Transform just  
20 bought accounting entries. To be clear, we're not claiming  
21 fraud. The issue is that there was a shortfall in the  
22 specified receivables that Debtors delivered.

23 Debtors shortchanged Transform on the specified  
24 receivables they delivered in two ways. First, Debtors  
25 delivered items that were not specified receivables. And

1 second, Debtors did not deliver what they agreed to deliver,  
2 pursuant to Schedule 1.1(k) and Annex 11.

3 Under the APA, Transform acquired specified  
4 receivables. Going back to the definition of specified  
5 receivables, there are two parts of it. The first, as we've  
6 discussed, is that it means accounts receivable. And the  
7 second part of the definition of specified receivables is  
8 that it's those accounts receivable that are set forth on  
9 Schedule 1.1(k).

10 Section 2.3(k) of the APA provides a mechanism for  
11 reducing Transform's obligations to assume certain  
12 liabilities if the specified receivables shortfall amount  
13 was a positive number.

14 So, why did Transform buy specified receivables?  
15 Transform sought to buy the opportunity to collect  
16 receivables. Transform understood there would be risk. As  
17 Mr. Friedmann mentioned, the Debtors provided Transform with  
18 a schedule of the recovery rates for the accounts specified  
19 in the schedule. But what Transform did not do was take the  
20 risk that it would not be able to collect on items or  
21 accounts because they were not receivables.

22 Debtors argue that Transform knew they had issues,  
23 but there's nothing in the record supporting that. As we've  
24 seen, the only thing in the record is the schedule of  
25 recovery rates that was part of the January 6th



1 presentation, which only speaks to how collectible specific  
2 accounts or items are, not whether they are receivables at  
3 all.

4 Debtors also argue that Transform could and did  
5 due diligence and should have known that there were  
6 apparently items on the specified receivables schedule that  
7 were not in fact accounts receivable. But they don't say  
8 just how this diligence would have revealed that fact. And  
9 in fact, they also argued that there were issues that  
10 Transform was only able to determine, based on months of --  
11 I'll start again.

12 THE COURT: No, the 1500 hours it took  
13 (indiscernible).

14 MS. MAINOO: The 1500 hours, exactly. The 1500  
15 hours, after months of work, months after the closing.

16 THE COURT: May I -- I'm going to cut to the chase  
17 on this because...

18 MS. MAINOO: Sure.

19 THE COURT: Why are intercompany receivables from  
20 non-Debtor entities not specified receivables under the  
21 agreement? Mr. Tavakoli lists almost \$18 million, over \$18  
22 million of those as -- it is, in his declaration, as not  
23 being specified receivables on the basis that they're  
24 encumbered receivables. One's from the Indian -- Sears  
25 India -- I'm sorry, it's just -- I'm sorry. It's just that.

1 It's not the other \$8.8. It's just the \$9.93.

2 MS. MAINOO: I believe Your Honor is referring to  
3 the page (indiscernible) --

4 THE COURT: Twelve, yeah.

5 MS. MAINOO: Okay.

6 THE COURT: The first bullet on Page 12.

7 MS. MAINOO: Right, and, sorry, you've read this  
8 just as well, Your Honor. Mr. Tavakoli explains that the  
9 intercompany receivable relates to a transaction between  
10 Sears entities and is not --

11 THE COURT: So, it's India.

12 MS. MAINOO: Between Sears India entities and  
13 Sears Holding Management Corporation.

14 THE COURT: Right.

15 MS. MAINOO: And thus is not a valid receivable  
16 because it does not relate to external third-party  
17 receivables.

18 THE COURT: Right. I didn't see anything about  
19 external third-party receivables in the definitions. I  
20 guess I don't understand, either company accounts with the  
21 Debtors, or I'm not even sure there, because you could have  
22 signed the claim to -- in fact, probably did sign the claim.  
23 But non-Debtor entity? At least in -- where does that fit  
24 into the definitions as being excluded from?

25 MS. MAINOO: I -- my understanding is that it's

1 based on the definition of accounts receivable and the idea  
2 that these intercompany receivables would not be collectable  
3 and would just reflect an accounting adjustment.

4 THE COURT: Okay. Well -- but again, there's a  
5 difference between collectability and something not being an  
6 account receivable at all.

7 MS. MAINOO: Right.

8 THE COURT: And I think Transform took the risk on  
9 the first and didn't on the second.

10 MS. MAINOO: Understood. And just to clarify, my  
11 understanding is that these intercompany receivables would  
12 just reflect accounting adjustments and not receivables.

13 THE COURT: And then I think there's -- the  
14 definitions were somewhat peculiar here. Specified  
15 receivables shall be the accounts receivable set forth on  
16 1.1(k).

17 MS. MAINOO: Right.

18 THE COURT: Specified receivable shortfall amount,  
19 which is right underneath it here on part one, it says:  
20 "Shall be an amount equal to \$255,200,000, less the amount  
21 of the specified receivables delivered to buyer at close,"  
22 so the phrase is: "delivered to buyer at close."

23 MS. MAINOO: Okay.

24 THE COURT: And then the popular section is roman  
25 vii on Page 41, that talks about the deducts, if it's not --

1 if it's positive. But we're saying that basically, it  
2 required a snapshot, right? Based on reality at the  
3 closing.

4 MS. MAINOO: We're saying that --

5 THE COURT: So, I mean, you're saying that if  
6 something had been paid before the closing, it's no longer  
7 accounts receivable.

8 MS. MAINOO: Correct.

9 THE COURT: Okay. And I understand that argument.  
10 But I think there's an equally valid point, which is if  
11 something didn't appear in the \$292 million, that actually  
12 was an account receivable at the time of the closing, the  
13 Debtor should get credit for that because the operative  
14 thing is the day of the closing, not the accounting exercise  
15 that parties went into -- the Debtor went into to develop  
16 the \$292.

17 MS. MAINOO: But there's nothing in the record  
18 suggesting that --

19 THE COURT: The Debtors didn't believe they --  
20 that that's the way you should do it. But if I adopt Mr.  
21 Tavakoli's approach, which I think is consistent with the  
22 agreement, I think you'd have to do that. You'd actually  
23 have to look at what the actual AR was that would fit into  
24 these categories, right?

25 MS. MAINOO: Just a minute, Your Honor. Your

1 Honor, we don't think that would qualify as a specified  
2 receivable for the purposes of the shortfall. You know,  
3 perhaps it wasn't considered --

4 THE COURT: What -- why?

5 MS. MAINOO: Because the definition of specified  
6 receivables, as you were to say, is tied to Schedule 1.1(k),  
7 which in turn cites to Annex 11, and we think that specified  
8 receivables should be interpreted in tandem with the  
9 specified receivable shortfall amount. In other words, the  
10 Debtors cannot just purport to deliver 255.2.

11 THE COURT: Well, I agree. So, is the actual  
12 accounts, so that means you could actually -- the \$292 is  
13 just a starting point, and then people spend 1500 hours due  
14 diligence-ing it, and decide whether -- you know, what  
15 really happened. The Debtors have taken their position  
16 consistently that that whole thing was a waste of time  
17 because their business is pretty much steady state and it'll  
18 all come out in the wash, which is why GAAP lets them report  
19 it this way, i.e., there's -- for every account receivable  
20 that's reported for GAAP purposes, that's been paid, in  
21 fact, and therefore you can say it's not merely an account  
22 receivable, there's a newly-generated account receivable  
23 that is not reported for GAAP purposes, and so, let's just  
24 do it the way we've done it. It all basically evens out.

25 MS. MAINOO: One other point, Your Honor, is I

1 think that argument credits to the idea that there were  
2 these constant fluctuations in the specified receivables,  
3 which is an argument that Debtors put forward. But what  
4 we've been able to determine, and this is confirmed in the  
5 Jeff Butz declaration, is that Debtors withheld two  
6 categories of purported specified receivables from their  
7 January 6th presentation, which they recognized were not  
8 accounts receivable that they then purported to deliver to  
9 Transform at closing. And this caused a jump in the  
10 accounts receivable that Debtors purported to have delivered  
11 by \$30 million dollars. So, the suggestion that there's  
12 this constant fluctuation is actually not borne out.

13 THE COURT: Well, it's natural that debts get paid  
14 after you report them. I mean, Mr. Tavakoli reflects them,  
15 and in some large numbers, here. And it's just -- it's  
16 equally natural that debts get owed by the account Debtors -  
17 -

18 MS. MAINOO: And then Your Honor --

19 THE COURT: -- during the period that you're  
20 reporting them. So --

21 MS. MAINOO: -- there may well be deductions. Our  
22 position is just that they should be addressed separately  
23 and not taken out of the specified receivables shortfall  
24 amount.

25 THE COURT: But what does that say that in the

1 specified receivable shortfall amount? It doesn't provide  
2 for that. I mean, if you're going to go with reality, as  
3 opposed to GAAP --

4 MS. MAINOO: Right.

5 THE COURT: -- it should be on both sides. I  
6 mean, it should be relatively easy, I would think, to track  
7 all the accounts receivable that were generated before the -  
8 - I'm sorry, after the \$292 million and before the closing.

9 MS. MAINOO: Well, and Your Honor, just to be  
10 clear, we did not buy all of Debtors' accounts receivable.  
11 We bought the specified receivables (indiscernible)

12 THE COURT: No, I know. It would be limited to  
13 those categories on 1.1, Annex 11. And then again raised  
14 the question, is that really what the parties intended, or  
15 did they intend to go with just the report? Now, to me, the  
16 plain language uses the term, "accounts receivable" and it's  
17 hard to say an account -- it doesn't say accounts receivable  
18 according to Debtors or, you know, prior recording practice.

19 MS. MAINOO: And that's elsewhere in the APA --

20 THE COURT: It says that in some sections.

21 MS. MAINOO: Exactly.

22 THE COURT: I appreciate that.

23 MS. MAINOO: For instance, and that's very  
24 valuable.

25 THE COURT: But I think it's sauce for the goose

1 and sauce for the gander. So, you -- you know, that would  
2 include accounts receivable that wouldn't be tracked on the  
3 Debtors' GAAP, but would be created before the closing.

4 MS. MAINOO: But -- and again, Your Honor, there's  
5 no evidence of this delay, and it sounds --

6 THE COURT: It's just common sense that that would  
7 happen.

8 MS. MAINOO: -- deficient.

9 THE COURT: I mean, it's consistent with Mr.  
10 Tavakoli's declaration, who says that there were payments  
11 after it was generated, before the closing.

12 MS. MAINOO: And again, I'm speculating. I don't  
13 understand that to be Debtors' argument. I understand their  
14 argument to be --

15 THE COURT: Well, no, it became Debtors' argument  
16 halfway through the oral argument, but that's not a reason  
17 to say it shouldn't -- it isn't valid. The Debtor, perhaps,  
18 it benefits the Debtor or perhaps because it makes common  
19 sense that you don't spend another 1500 hours looking at  
20 this issue, says just go with how the parties have looked at  
21 this always. But the agreement doesn't say that, so --

22 MS. MAINOO: And there's no evidence that this is  
23 how the parties have looked at it, obviously.

24 THE COURT: Fine.

25 MS. MAINOO: So, briefly, Debtors delivered items



1 that were not -- unless you have more questions, Your Honor.

2 THE COURT: No.

3 MS. MAINOO: Debtors delivered items that were not  
4 specified receivables. They delivered items that were not  
5 accounts receivable, i.e., money owed to the company. This  
6 includes cash received pre-closing and CIE inventory already  
7 received pre-closing. They also purported to deliver items  
8 that just reflected accounting adjustments, which were not  
9 billed. In addition, as I started to address first --

10 THE COURT: Can we deal with that part, accounting  
11 adjustments which were not owed?

12 MS. MAINOO: Yes.

13 THE COURT: Is that just the fee point?

14 MS. MAINOO: This is -- so I'm looking at Page 11  
15 of Mr. Tavakoli's declaration --

16 THE COURT: Right, that's the Weil Gotshal fee  
17 point?

18 MS. MAINOO: It is.

19 THE COURT: I understand that.

20 MS. MAINOO: Right.

21 THE COURT: I mean, that's not really accounts  
22 receivable. Weil Gotshal is not going to pay the Debtors,  
23 right?

24 MS. MAINOO: Right. It's also --

25 MAN: No, Your Honor.

1 (Laughter in the Courtroom)

2 MS. MAINOO: It also includes pre-paid balances,  
3 which is on Page 13 of Mr. Tavakoli's affidavit, or  
4 declaration.

5 THE COURT: Right.

6 MAN: We would take them up on that.

7 (Judge laughs)

8 THE COURT: Okay.

9 MS. MAINOO: And I was starting to say earlier,  
10 Your Honor, Debtors also delivered items that were -- just  
11 were not on Annex 11 at all. Counsel for Debtors said they  
12 delivered to Transform whatever was on 1.1(k), but we know  
13 from Mr. Butz's work that, in fact, that's not the case  
14 because Debtors did pick and choose what was delivered to  
15 Transform, including at \$30 million dollars of so-called  
16 "all other receivables" that were not actually receivables.

17 THE COURT: But that -- but again, that's -- I  
18 think you're making the same point in two different ways.  
19 Right? I mean, if they've already paid, it's not an account  
20 receivable, so it doesn't matter that it is added again  
21 because it's not real.

22 MS. MAINOO: No, no, no. The point is that the  
23 language of the APA matters, and the APA defines specified  
24 receivables with reference to Schedule 1.1(k) and Annex 11,  
25 which listed 30 specific categories of items, including

1 amounts, and that -- amounts that were not included on Annex  
2 11 were later delivered.

3 THE COURT: Well, what really doesn't make any  
4 sense, to me at least, that they'll be held to those amounts  
5 in each category. That just doesn't make sense to me. I  
6 mean, that means that you get penalized for delivering more  
7 in a category? I mean, it just doesn't -- it doesn't --

8 MS. MAINOO: No, the argument is that they  
9 delivered more in that category to avoid -- in an effort to  
10 avoid a specified receivable shortfall.

11 THE COURT: No, but the other -- the -- and what  
12 if -- I mean, but we're saying that it had to be fixed in  
13 each category, whereas, in fact, Transform benefits from  
14 getting more in many of the categories. It actually  
15 benefits from that, because those are more collectable. To  
16 me, it's just an aggregate number.

17 MS. MAINOO: So, I'll just point you to Mr. Butz's  
18 declaration, Your Honor, which explains why Transform did  
19 not get value by receiving these items that were identified  
20 as excluded, and all other items, in Paragraph 9. Actually,  
21 I'll point back to Paragraph 6 of Mr. Butz's declaration, in  
22 which he explains that these two categories of accounting  
23 entries, the "Open/Unidentified Items" and "Excluded" items,  
24 which Debtors later added to what they purported to deliver  
25 at closing, included certain accounting adjustments and

1 other prepaid items written off over a period of time, which  
2 were not treated as accounts receivable.

3 THE COURT: I understand that, but they're already  
4 out, as far as I'm concerned, because they're not accounts  
5 receivable. But I don't think that suggests that the  
6 parties bound themselves, in each case, to this specific  
7 dollar amount in the schedule, because it really doesn't  
8 make much sense to do it that way.

9 MS. MAINOO: But the parties --

10 THE COURT: It just doesn't work that way. When  
11 we arrive --

12 MS. MAINOO: What the parties bound themselves to,  
13 was that Debtors would deliver accounts receivable.

14 THE COURT: Yes. I agree with that. And that  
15 they'd get credit for all accounts receivable that they  
16 delivered.

17 MS. MAINOO: And there's no indication in the  
18 record that they have not gotten credit for accounts  
19 receivable.

20 THE COURT: It hasn't -- the analysis hasn't been  
21 done. Mr. Tavakoli didn't look at that. So, I guess he's  
22 going to have to spend another 1500 hours looking at that.  
23 I mean, that's the only answer, right? Okay. Unless the  
24 parties just want to go with where they are.

25 MS. MAINOO: Your Honor, just to reiterate a point

1 I tried to make earlier. The point is that the Debtors  
2 would get the benefit of those credits. Our argument, our  
3 position, is that that should not reduce the specified  
4 receivable shortfall amount.

5 THE COURT: But why? Does it -- the specified  
6 receivables shortfall amount is not limited to just the  
7 calculation which occurred and asserting, which is actual  
8 accounts receivable delivered at closing, but only as  
9 identified by the Debtor in its schedule at closing, as  
10 opposed to what, actually, they are. Again, I think -- I  
11 think either it was you or Mr. Friedmann said two very  
12 different methodologies are at work, here. Debtors are  
13 doing this based on accounting entries.

14 MS. MAINOO: Right.

15 THE COURT: And you're doing it based on actual  
16 analysis. But the actual analysis isn't going to -- it  
17 hasn't included newly-created AR, I don't think. Newly-  
18 created between the schedule that the Debtors gave and the  
19 closing date. And clearly, Transform is getting the benefit  
20 of those. The Debtors aren't saying that they're going to  
21 keep those. Those (indiscernible) that Transform's gotten  
22 since then.

23 MS. MAINOO: Well, again, there's no evidence that  
24 --

25 THE COURT: I know, because it hasn't been done.

1 It needed to be done.

2 Okay, I think I have enough on this, unless  
3 someone has some other point.

4 MS. MAINOO: Thank you, Your Honor.

5 THE COURT: All right. The next issue that the  
6 parties have with each other, next dispute, that is, is with  
7 regard to the operation of § 2.3 little roman vii, which  
8 provides for a credit taken against certain obligations that  
9 Transform would otherwise have under the APA to pay certain  
10 implied orderlies of the Debtors. The credit would be a  
11 trigger that, in the event a defined (indiscernible)  
12 specified receivable shortfall amount. That's defined in §  
13 1.1 of the agreement, as if it shall be an amount equal to  
14 \$255,200,000, less the amount of the specified receivables  
15 delivered to the buyer at closing.

16 So, again, if the specified receivables delivered  
17 to the buyer at closing are in excess of that amount,  
18 there's no credit. It's the short specified receivable is  
19 lower than that amount, then the -- Transform has the right  
20 to (indiscernible) the liabilities in § 2.3 when it said  
21 specified receivables is defined as the accounts receivable  
22 set forth in Schedule 1.1(k). 1.1(k) actually incorporates  
23 Annex 11. It lists 32 categories of receivables including  
24 "all other receivables," that add up to \$255.2 million.  
25 That was submitted number at the time the parties came up

1 with this -- the aggregate number, the parties came up with  
2 this construct.

3 The Debtors argue that, as long as, on their  
4 traditional GAAP accounting and financial reporting  
5 methodology, they have, in fact, delivered such "accounts  
6 receivable," and I'll put quotation marks around the term  
7 "accounts receivable," at the closing, then they satisfy  
8 their condition and there's no shortfall. They certified  
9 over \$292 million of such accounts receivable being  
10 delivered at closing.

11 Transform contends to the contrary, two things.  
12 First that the accounts receivable had to be specifically  
13 delivered in the amounts set forth as against each category  
14 on Annex 11, and secondly, that they have to be actual  
15 accounts receivable, not "accounts receivable" in quotes for  
16 GAAP purposes. That is, if although it would be proper to  
17 report an item as an account receivable, even though it  
18 turned out to have been paid or prepaid, or be simply an  
19 accounting matter rather than an actual account receivable,  
20 such as an amount prepaid for services where the  
21 (indiscernible) has not yet submitted invoices, it will not  
22 count as an accounts receivable, in lay terms, certainly,  
23 and therefore, anything like that should be deducted from  
24 the \$292 million.

25 As to the first argument, i.e. that every category

1 has to be the amount stated in Annex 11, I accept the  
2 Debtors' logic that Annex 11 moves in those itemized numbers  
3 to come up with an aggregate number, and it is the aggregate  
4 number that is the key. I say this because the Debtors  
5 really have (indiscernible) and control over accounts  
6 receivable other than, as I'll get to, reporting something  
7 that actually isn't an account receivable. And secondly,  
8 that the buyer actually has -- that the buyer's  
9 interpretation would lead to an odd resolved debt, the  
10 Debtors punished for providing accounts receivable in excess  
11 of the amount in any particular category, and there's  
12 actually more collectable than other categories. It's just  
13 not logical that the parties would bind themselves to such  
14 an approach, as opposed to looking at the aggregate number.

15 On the other hand, accounts receivable in the  
16 definition is not in quotes, it's not stated "accounts  
17 receivable for GAAP purposes," or as reported by the Debtors  
18 in their financial reporting, and I take it to mean,  
19 therefore, that the natural layman's reading of it, accounts  
20 receivable, applies, which means that it's an account  
21 receivable meaning the account where there's not yet been  
22 paid, as of the closing. This is certainly consistent with  
23 the logic of the agreement.

24 On the other hand, taking such a logical approach,  
25 I believe, while warranted, also means that the Debtor may



1 well be shortchanged in that it's not getting credit for  
2 accounts receivable that may well have been generated that  
3 didn't get into the \$292 million certification, but that  
4 were, in fact, in existence, prior to closing, that the  
5 buyer actually got the benefit of, and that, therefore,  
6 should not be left out of the calculation to add up to the  
7 \$255.2 million.

8 I also believe that, while most of the deductions  
9 for not-valid accounts receivable take in view Mr.  
10 Tavakoli's analysis, are correct. Those attributable to  
11 intercompany transactions where there actually is an account  
12 receivable isn't carved out anywhere in the parties'  
13 agreement. So, therefore, those deductions, which I think  
14 appear both on Page 12 and Page 13, should be added back in.  
15 Clearly, this will lead to more work, which suggests that  
16 maybe the parties ought to agree on the Debtors' formulation  
17 of this, as opposed to incurring the cost and delay of the  
18 further analysis, but I think that's up to them. I don't  
19 think the agreement compels that result, although it may be  
20 a practical result. So, that's my (indiscernible) on this  
21 issue.

22 I will say further, this goes -- and I'm giving  
23 you a, I guess a picture into my thinking about the next  
24 issue, if it's going to come up for today's calendar, that  
25 if the parties stick with my interpretation of the agreement

1 and don't go back to the GAAP treatment of this, there needs  
2 to be a clear process where designated, knowledgeable people  
3 on both sides, and that clearly includes Mr. Tavakoli and  
4 his team, work on these issues together. And my preliminary  
5 thinking on this, and we can discuss it more in the next  
6 iteration was, if that doesn't happen, within the next ten  
7 days, I'll appoint an examiner, the cost of whom will be  
8 split between the parties, to do it. I'm just, you know,  
9 the parties have one shot to do it on their own now that  
10 they know, at least what I think the proper analysis should  
11 be. If they can't work together to do it, then I'll appoint  
12 someone who will do it who's objective and they'll each pay  
13 for half of it.

14 So, let's move, then, to I think, the Estate  
15 property reconciliations issue, as it still exists. Because  
16 again, part of that's what resolved before we started this  
17 hearing.

18 MR. FRIEDMANN: Yeah, Your Honor. So, the issue  
19 does still exist, but the numbers have shifted a little bit  
20 in light of the partial settlement agreement this morning  
21 regarding the, I guess, the Estate checks that have not yet  
22 cleared, but that were going into the escrow as discussed.

23 So, this is an issue, Your Honor, that we've been  
24 back to you a couple of times now. We initially moved on  
25 this months ago, and it's really as a result of the Debtors'

1 cash management system being transferred to buyer and buyers  
2 also depositing Estate proceeds. We've ended up with a  
3 whole lot of property of the Estate in buyer's possession.  
4 And none of the following numbers I'm going to review with  
5 you are in dispute, because they're all coming straight from  
6 Mr. Hede's declaration of June 25th, 2019.

7 The Cash in transit, and that's \$22,452,428;  
8 Credit Card proceeds from GOB stores and that's at  
9 \$4,368,957; Estate checks that were deposited to Buyer  
10 account in the amount of \$5.945,069; and Proceeds from  
11 Subtenants in the amount of \$657,243. That totals  
12 \$33,423,697. Now, that now needs to be netted against two  
13 things. First, there was a \$3 million-dollar payment by the  
14 Buyer to Debtors as an interim agreement, and then in  
15 addition, the \$2.4 million-dollar settlement of this morning  
16 is now going in escrow. So, now there's \$28 million-dollar  
17 of Estate property that, indisputably, is being held by  
18 Transform.

19 Of course, Buyer has refused to turn over these  
20 monies, in violation of the automatic stay, on the basis  
21 that it claims various set-offs based on a number of  
22 different liabilities. You heard today already about the  
23 Estate checks after March 18, 2019. As you heard the  
24 testimony of Mr. Hede, in the month or so between the  
25 closing and March 18th, 85 percent of the checks that were

1 received and deposited into Transform's accounts ended up  
2 belonging to the Estate. There was another \$858,105,  
3 representing about 277 checks, which Mr. Hede testified, he  
4 wasn't sure who gets them, so the conclusion was,  
5 apparently, Transform is just keeping that money. A  
6 reconciliation clearly needs to happen of those checks as  
7 well.

8 Even more troubling is the fact that they've drawn  
9 this hard line in the sand of March 18, 2019, and have  
10 refused subsequent requests by Debtors to reconcile checks  
11 there afterwards. It's not conceivable that in the first 30  
12 days or so, 30 plus days, after the closing, 85 percent, at  
13 least, of the checks actually were Estate checks that were  
14 being deposited by Transform, and then suddenly, the drop-  
15 off right after that would go to zero. It may not be 85  
16 percent, but there is some percentage. Mr. Hede was aware  
17 of at least one check, and I'm certain it's a lot more than  
18 that, and that's a reconciliation that has to happen.

19 The Buyers take the position that it's Debtors  
20 obligation to make a prima facie showing that we're entitled  
21 to those monies and that they shouldn't have the burden of  
22 going through that reconciliation, and they've really got  
23 this upside down. They're the ones holding Estate property.  
24 They're the ones refusing to turn over the Estate property  
25 on the basis of purported reconciliations. Those include --

1 some of those Estate properties being held are these checks,  
2 and the fact that 85 percent of the checks between close and  
3 March 18, 2019 were, in fact, determined to be Estate  
4 property is pretty clear prima facie evidence that it  
5 warrants them going and taking a look at the next couple of  
6 months as well, and finding checks in addition to the check  
7 that Mr. Hede did concede he already was aware of.

8 Another item of -- other reconciliation I'd like  
9 to talk about are what are called pre-close orders that were  
10 canceled post-close. To the extent that a canceled order is  
11 an excluded liability, which is what the buyer claims, under  
12 the APA, no one forced the buyer to assume those liabilities  
13 on the Debtors' behalf and pay back those. Just to be  
14 clear, this is an example of something where, pre-closing,  
15 someone had a deposit or paid money for an item, and that  
16 before the item was shipped, the buyer of that item canceled  
17 their order. They have a claim against the Estate if it's  
18 an excluded liability. What the APA does not provide for is  
19 that Transform can make a payment to that canceled buyer and  
20 then go to the Debtor and ask to be reimbursed for that.

21 The decision to, on their own, make that payment,  
22 was a business decision. And frankly, perhaps, a good one.  
23 They didn't want members of Shop Your Way to be upset that  
24 when they went to cancel their order, instead of getting  
25 money back, they were told, give Weil Gotshal a call or file

1 a claim with the clerk in White Plains. So, instead, they  
2 decided to pay those individuals, which is fine, but there's  
3 no obligation in the APA for us to reimburse them for that,  
4 and therefore, that is not a proper set-off against the  
5 Estate property that they're holding.

6 THE COURT: They're not subjugated?

7 MR. FRIEDMANN: I'm sorry?

8 THE COURT: They're not subjugated?

9 MR. FRIEDMANN: They may be.

10 THE COURT: So, do they have a set-off right?

11 MR. FRIEDMANN: Perhaps, but the bottom line is,  
12 if there was a claim against us -- they were in control of  
13 the company at that point, and they were the ones making the  
14 decision to pay back that buyer. Some of these claims of  
15 information produced by Transform's advisors go back years.  
16 So, the -- it's not even clear whether or not they actually  
17 paid this money back, or they were just cleaning up their  
18 books. The point is, is that they were in control, they  
19 were making decisions, they weren't consulting us, for sure,  
20 about it. Instead, at the end of the day, they're saying  
21 there were all these canceled orders, post-close. We're  
22 holding that against you. We're deducting that from the  
23 money we otherwise agree we owe you.

24 THE COURT: Are you saying that you don't have  
25 proof that they didn't make the payments? I mean, that they

1 did make the payments.

2 MR. FRIEDMANN: We don't have proof that they did  
3 make the payments.

4 THE COURT: That they did make the payments?

5 MR. FRIEDMANN: Yes.

6 THE COURT: Okay.

7 MR. FRIEDMANN: Another issue are, they called  
8 Estate checks cleared, and there's a deduction for a total  
9 of \$11,444,233 on that basis. Our issue with their -- and  
10 these are, to be clear, checks that were written pre-close  
11 by the Debtors and were cashed against the accounts that  
12 were transferred to Transform post-close. And in theory, we  
13 don't have an issue with the concept that if we wrote a  
14 check pre-close, it was cashed against our account post-  
15 close, they were in control of it. We understand that that  
16 should be deducted against it.

17 The problem we have is that they were including  
18 checks for property taxes, and here's where that becomes an  
19 issue is that, as Your Honor noticed, under the APA, the  
20 Buyer assumed all liabilities for property taxes. That's  
21 2.4(1), up to, but not to exceed, \$135 million dollars. As  
22 far as we know, the property taxes that they took on the  
23 liability for have gotten nowhere near approaching that  
24 cutoff.

25 So, what was taken on was, as of the closing, any

1 outstanding liability for property taxes on the books of  
2 Debtors, they assumed. They're taking the position now that  
3 well, they -- a check was cut pre-closing, we didn't assume  
4 that. But that's not the way the APA works. It focuses on  
5 the books and records of the company and what liabilities  
6 there were as of 12:01 on February 11th. And, as Transform  
7 no doubt appreciates and knows, that that liability doesn't  
8 come off the books --

9 THE COURT: Assuming you operated in the ordinary  
10 course.

11 MR. FRIEDMANN: Yeah, assuming I operated in the  
12 ordinary course, the fact that we were sending these checks  
13 out up until the day before the close, or the Friday before  
14 the close, I think, demonstrates that we were operating in  
15 the ordinary course, and I don't think there's any  
16 allegation that property taxes were not being paid in the  
17 ordinary course.

18 But, as of 12:01, on February 11th, that's when  
19 you have to look at the books and records of the company and  
20 see what outstanding tax liabilities there were, and that's  
21 what was assumed. So, to the extent that Debtors -- sorry,  
22 that Buyers now not -- is not assuming those and instead,  
23 it's using those amounts against the Estate property that  
24 they otherwise agree they owe to the Estate is plainly  
25 improper, and ignores and shirks their obligation to take on



1 the liability for the outstanding property taxes.

2           There's an argument in Buyer's brief that suggests  
3 that we -- there only are maybe two of these checks that we  
4 believe are written to taxing authorities, but there's  
5 significantly more. The example of two was preceded by  
6 e.g., suggesting it was just an example. In fact, there are  
7 upwards of 100 of these checks that we have -- that we're  
8 aware of, which have not been reconciled to pull out the  
9 ones that are for property tax that existed as a liability  
10 at the time of the close.

11           So, those really represent the three main  
12 categories of concern that we have, and the point, Your  
13 Honor, here is that this deal closed on February 11th, 2019,  
14 some five months ago now, and this reconciliation still  
15 hasn't been completed. All that while, the monies that  
16 Transform ended up with in their possession that belong to  
17 the Debtor because of the transfer of the cash management  
18 system, has been held by them in violation of the automatic  
19 stay.

20           And it continues today, and although Mr. Good  
21 suggested that progress has been made, we're nowhere near  
22 being complete. This analysis of the March 18th checks, for  
23 example, hasn't even started. The point is, this can't go  
24 on forever, is that for the last five months, they've  
25 basically had an interest-free loan at the expense of the

1 Debtors, holding onto this money while they have taken their  
2 time to try to reconcile this, with obviously no incentive  
3 to do so, because the longer it takes, the longer they hold  
4 onto that money.

5 And what we're asking for today, Your Honor, is  
6 for you to shift that balance, to have them immediately pay  
7 over the outstanding \$28.4 million dollars that they agree  
8 are owed the Estate, and the Estate will agree, once the  
9 reconciliation is completed, to pay back to Transform any  
10 amounts of that are due in light of any proper  
11 reconciliations. But that money should not be -- continue  
12 to sit with Transform indefinitely. And instead, I think  
13 that will incentivize Transform to complete their analysis  
14 very quickly, and get us to the appropriate resolution here,  
15 while preventing any further abuse of the automatic stay,  
16 which was designed to prevent exactly what's going on, here.

17 THE COURT: You haven't addressed the prepaid  
18 inventory shortfall issue.

19 MR. FRIEDMANN: We had that as a separate topic,  
20 Your Honor. You want me to address that as part of this?

21 THE COURT: Well, okay, let me just deal with the  
22 reconciliations at this point, okay.

23 MR. FRIEDMANN: Yeah, just -- yeah.

24 THE COURT: That's fine. When do you think all  
25 the reconciliations should have been done by?

1 MR. FRIEDMANN: Given the amount of manpower they  
2 have put towards coming up with new ways of calculating  
3 prepaid inventory and specified receivable, just so they  
4 could create a different methodology to compare to what  
5 everybody agreed is the way we calculated at the beginning  
6 of the agreement, that's how the (indiscernible) is set, had  
7 they put the same effort towards this, we would have had  
8 this resolved long ago. The problem is, is that on this  
9 one, there's no incentive to figure it out, because the  
10 longer they wait --

11 THE COURT: Well, I'm just trying to figure out  
12 when. I mean, rather than have \$28 million dollars in  
13 unrestricted funds delivered to the Debtor, we could  
14 conceive of a methodology that says that each side owes 9  
15 percent judgment interest on -- pre-judgment interest on  
16 what they owe once it's determined. Both sides. And -- but  
17 I'm trying to figure out, if I do that, when would that  
18 start? It wouldn't start on February 12th. Maybe it would  
19 start March 12th. I don't know.

20 MR. FRIEDMANN: We didn't expect the  
21 reconciliation to happen overnight. We reached interim  
22 agreement with Transform with the express idea that, at that  
23 point, which was in March 20th or so, so the idea was by  
24 early April, they would finish their reconciliation. They  
25 made that initial payment of \$3 million dollars, which I

1 referenced earlier, with the idea -- and we said, fine.  
2 We'll give you a little more time, you need more time. They  
3 said, by, I think it was April 4th, they would be able to  
4 give us the rest of the reconciliation. That clearly did  
5 not happen, and now we're May, June, July, three months  
6 later, we still haven't gotten these monies.

7 And again, there is no incentive for Transform to  
8 get it done because they've benefitted from sitting on this  
9 \$30 million dollars or whatever it might be. And the  
10 concern we have, really, is that the -- we don't know if  
11 it's, at the end of the day, it's going to be more or less  
12 than the -- I guess it's the \$28 million-dollar  
13 (indiscernible) right now because when they reconcile the  
14 rest of those checks, the amount they owe us may go up. So,  
15 there's certainly -- look, there are areas that we would  
16 agree without much work, we could agree that the set-offs,  
17 you know, with respect to P-cards or telecom expenses or the  
18 KERP payment, those kind of things, we don't really have an  
19 issue with right now.

20 The problem is, is that we can't just deduct that  
21 from their starting point number, because the starting point  
22 number may also go up when they reconcile against the checks  
23 that they've pulled out -- or that they've failed to pull  
24 out that are property taxes, or when they do the analysis of  
25 all the checks from after March 18th that may have been

1 deposited in the Transform account but they relate to  
2 Debtors.

3 THE COURT: Okay.

4 MR. FRIEDMANN: So, Your Honor, for that reason,  
5 we respectfully request that the \$28 million dollars be  
6 turned over to Debtors, and we believe that that will  
7 encourage very quickly, Transform to finalize the rest of  
8 the reconciliation. Thank you.

9 MS. MOONEY: Good afternoon, Your Honor. Margot  
10 Mooney, Cleary Gottlieb Steen & Hamilton on behalf of  
11 Transform. Your Honor, frankly, the Debtors' argument that  
12 we're violating the automatic stay is absurd. As you've  
13 said before, as you've recognized, adjusting accounts  
14 through a reconciliation process, which is recoupment, is  
15 not subject to automatic stay, and Debtors themselves have  
16 acknowledged that there are several credits to Transform  
17 that are appropriate. Therefore, the total amount, I think  
18 it was \$28.8 million, that they gave just now, is not an  
19 amount that is entirely owed to Debtors, if at all.

20 And as, funds that are subject to recoupment are  
21 not Estate property. "That's in re Malinowski"

22 THE COURT: But in the meantime, Transform does  
23 have the benefit of the money.

24 MS. MOONEY: Actually, when you look at the  
25 reconciliation that Ernst & Young, Mr. Hede put together, we

1 are owed money by the Debtors, not the other way around.

2 THE COURT: But it has the benefit of the money  
3 that it owes the Debtors.

4 MS. MOONEY: But I don't think that that money is  
5 owed to the Debtors. I think that money that is subject to  
6 recoupment is not Estate property.

7 THE COURT: Well, I guess that's why, it seems to  
8 me -- that may ultimately be the case, but then maybe both  
9 sides, at this point, since it's dragged on probably two and  
10 half months more than it should, should be paying interest  
11 on what they owe. And maybe it'll all come out in the wash  
12 and one side will only be paying, you know, \$100,000 of  
13 interest, but it seems to me that there is a potential there  
14 for (indiscernible) incentive.

15 MS. MOONEY: Well, right now, what the Debtors are  
16 asking for is a one-sided resolution, for them to get --

17 THE COURT: I understand that.

18 MS. MOONEY: All of the funds owed to them, while  
19 denying Transform any recoupment.

20 THE COURT: It just postpones the fight until the  
21 combination date.

22 MS. MOONEY: So, we just wanted to walk through  
23 the remaining issues. As you heard, there are very few  
24 things that remain in dispute, but to respond to the points  
25 that --

1 THE COURT: And at least, in going through the --  
2 excuse me, going through the list that he did, none of these  
3 -- except, perhaps, for the canceled post-closing orders --

4 MS. MOONEY: The pre-close orders cancelled post-  
5 close.

6 THE COURT: -- raises a legal issue, right? These  
7 are just accounting issues? I'm not talking about GAAP  
8 accounting, I'm talking about basic accounting.

9 MS. MOONEY: Right. I think with respect to the  
10 Estate checks that have already cleared, Debtors seek to  
11 exclude any that were on account of property taxes --

12 THE COURT: Right.

13 MS. MOONEY: And I think that that has no --

14 THE COURT: Why is that a legal issue?

15 MS. MOONEY: The legal issue there is whether or  
16 not property taxes have any -- whether or not the fact that  
17 these checks were for property taxes have any bearing on the  
18 fact that they were checks written by the Debtors prior to  
19 closing that were drawn on Transform's accounts post-  
20 closing, and whether they should be treated any differently  
21 because of the fact, if they are, in fact, property taxes  
22 (indiscernible).

23 THE COURT: Well, can you remind me, what is the  
24 section where Transform assumes up to \$135 million of --  
25 it's 2.3 something, I assume. Or maybe it's in 6, I forget.

1 MS. MOONEY: It's 1.1, the definition of assumed  
2 taxable property tax liabilities.

3 THE COURT: Right. But the operative section  
4 (indiscernible)?

5 MS. MOONEY: 2.3 though is the assumed  
6 liabilities, which is where, I mean, it's clear that assumed  
7 liabilities are --

8 THE COURT: I'm sorry, I didn't hear what section.

9 MS. MOONEY: I'm sorry. 2.3 --

10 THE COURT: Right.

11 MS. MOONEY: -- and then (1) is the --

12 THE COURT: 2.3(1). Let me get to that.

13 MS. MOONEY: Yes.

14 THE COURT: Assumed property tax liabilities.  
15 That just takes you back to the definition --

16 MS. MOONEY: Right. And that's where it becomes  
17 clear that the assumed property tax liabilities are assumed  
18 property tax liabilities as of close, and as the Debtors  
19 have acknowledged, they were writing checks in the lead up  
20 to the close, and in the APA they're required to pay  
21 property taxes in the ordinary course of business, which  
22 that's under 8.1(a) is the ordinary course requirement, and  
23 also 8.1(b) little romanette ix provides that they're  
24 prohibited from taking any action that would materially  
25 adversely affect the Potential Acquired Assets, the



1 Properties, Business and the Assumed Liabilities of which  
2 the assumed property tax liabilities are included.

3 THE COURT: Right, but is there any allegation  
4 that they did that? That they held the checks back out of  
5 the ordinary course?

6 MS. MOONEY: No, I don't believe that they were  
7 holding them back. They were written, and they were sent,  
8 and if they were -- had they been cashed at the moment  
9 before closing, they would have been liabilities of the  
10 Debtors.

11 THE COURT: Right, but they weren't.

12 MS. MOONEY: But does it -- the --

13 THE COURT: I mean, the definition says,  
14 liabilities for property taxes payable, and liabilities  
15 means amount owed, any liability. So, it's owed. I mean,  
16 that seems to be a no brainer to me.

17 MS. MOONEY: I believe that, at Sears, once they  
18 write the check, it's not on their books anymore, and they  
19 were --

20 THE COURT: It's owed. It's a liability owed.  
21 It's owed.

22 MS. MOONEY: In order to --

23 THE COURT: The taxing authority doesn't have it.

24 MS. MOONEY: Right, but in order to accept that,  
25 you would have to accept that they were writing checks with

1 the intention that they would not be drawn -- that they were  
2 signing them in their name with the intention that they  
3 would be drawn on Transform's books. The -- whether a check  
4 sat in a drawer because of some bureaucratic reason or it  
5 was in the mail or something, that shouldn't change the  
6 liability, whose burden the liability is, purely because of  
7 --

8 THE COURT: Well, it's still a liability. I mean,  
9 to put it differently, if they had written the check -- well  
10 -- I mean, they got permission to do this. But if they had  
11 written the check pre-petition but it hadn't been cashed, it  
12 would be a pre-petition liability. They got authority to  
13 pay pre-petition debt for taxes, but (indiscernible) that's  
14 why they had to get it. So, I think -- I don't think that's  
15 a legal issue. I think it's just an accounting issue, and  
16 the parties should -- my take on this is similar to the one,  
17 as I told you before, parties can have 10 days to bring this  
18 to a head, with the responsible people meeting, no games on  
19 either side, whether it needs to go through this, sit down  
20 and go through it. If you can't do it in 10 days, I'll  
21 appoint an examiner. Both sides pay half, and 9 percent  
22 interest from April 15th on the obligations that run either  
23 way. Net in, net out, maybe one side will end up paying,  
24 you know, millions of dollars in interest, I don't know.

25 MS. MOONEY: Thank you, Your Honor.

1 THE COURT: Okay, thanks. But to be clear, to me,  
2 this is just a numbers counting issue. There are no real  
3 issues here, at this point. There -- you know, you've got  
4 to look at all the pre-closing checks and you've got to look  
5 at the -- pick a reasonable time for the post-March 18th,  
6 I'm thinking June or July, you know, and rent's really easy.  
7 There needs to be some reasonableness involved here, in  
8 terms of looking at it. And frankly, it's another way of  
9 saying -- that's why -- another reason I'm thinking of an  
10 examiner, if the parties want to pay for an examiner to do  
11 what you all should have done, then hopefully, one side is  
12 not going to require doing what's unnecessary because then  
13 the examiner will be doing it and you're going to be paying  
14 half of that. So, hopefully, you won't do that.

15 MS. MOONEY: Thank you, Your Honor.

16 THE COURT: We need both sides not doing that.  
17 Okay.

18 MR. FRIEDMANN: Your Honor, now, with your  
19 permission, I'll address the prepaid inventory.

20 THE COURT: Okay.

21 MR. FRIEDMANN: So, I have a feeling I know where  
22 we're going to end up on this, but we'll argue it anyway  
23 first. The prepaid inventory, there was a shortfall amount  
24 set at \$147 million dollars, less the amount for the prepaid  
25 inventory. So, here again, there was a peg set at \$140

1 million dollars at the time of the execution of the APA, and  
2 the parties were obliged to deliver, at the time of close,  
3 \$147 million dollars of prepaid inventory at close, same as  
4 what they had in the beginning, they'd have at the end.

5 Now, this \$147 million dollars was not just picked  
6 out of a hat. It's not a random number. They would have  
7 probably picked something rounder like \$150, had they done  
8 that. The way that they got \$147 million dollars is that's  
9 exactly what was on the company's books and records using  
10 their accounting methodology, that same accounting  
11 methodology that Debtors used pre-petition, the same one  
12 they used throughout the bankruptcy, the only one that  
13 existed when they negotiated the \$147 million dollars  
14 because as Mr. Hede testified, when they negotiated the APA  
15 and picked that \$147 million dollars, he hadn't even  
16 entertained yet some of the methodology that he came up with  
17 to calculate prepaid inventory and spent all that time, no  
18 one could have conceived of that yet.

19 So, the reasonable expectations of the party when  
20 they agreed that they would -- that at closing, Debtor would  
21 have to deliver \$147 million dollars' worth of pre-inventory  
22 at closing, was that the calculation to get to that \$147  
23 million dollars or something short of it, which is, by the  
24 way, where we ended up, would be calculated in the exact  
25 same way it was when the \$147 million dollars was identified

1 in the first place.

2 THE COURT: Well, except it doesn't say that. I  
3 mean, this is kind of déjà vu all over again.

4 MR. FRIEDMANN: Right, so that's what I was  
5 predicting.

6 THE COURT: I know. And I think -- I mean, don't  
7 respond to this yet, but I think the -- when the Transform  
8 side makes a good point that there are -- there's at least  
9 one section in the agreement where the parties do  
10 specifically incorporate that type of methodology. So, they  
11 do it there, they don't do it here, the implication is --

12 MR. FRIEDMANN: With respect to prepaid inventory,  
13 though, it's a little bit different and the reason is, is  
14 that -- and maybe not, there. Maybe they should apply to  
15 both, but inventory, which is incorporated after -- prepaid  
16 inventory is defined as shall mean all inventory, and that  
17 goes on to explain that it's been paid for by the seller  
18 prior to the closing date, to which the seller has not taken  
19 title or delivery as of the closing date. Inventory is then  
20 defined, capital I, same Inventory as in prepaid Inventory,  
21 to talk about, "reflected on the stock ledger" is the  
22 language used when inventory is discussed.

23 So, this notion that there is no connection at all  
24 to the accounts and books and records of the company I'm not  
25 sure is entirely fair. I think that that certainly was the

1 intent of the parties, and that's how they got to the \$147,  
2 is they used that methodology, and there certainly is  
3 nothing in the agreement that suggests that some other  
4 methodology should be used after the fact.

5 THE COURT: But isn't there -- maybe it's getting  
6 late in the afternoon, but isn't there a specific carve-out  
7 in the methodology for prepaid inventory? I have to -- is  
8 there one?

9 MS. MAINOO: Yes, Your Honor. There is one at  
10 10.9.

11 THE COURT: Excuse me, which section?

12 MS. MAINOO: 10.9.

13 THE COURT: 10.9, yeah. So, let me -- I want to  
14 make sure I understand your argument, Mr. Friedmann. I  
15 think -- turning to that section.

16 MS. MAINOO: 10.9 cites back the (indiscernible)  
17 inventory, which is defined in 2.1 as prepaid inventory.  
18 That's what it looks like.

19 THE COURT: Well, yeah. It's the inventory  
20 receivables is the (indiscernible) matter of the inventory  
21 value of the acquired inventory, excluding any pending  
22 inventory. So, I guess your point is that you would value  
23 all inventory this way? Because --

24 MR. FRIEDMANN: It's -- well, it's specifically  
25 referenced here.

1 THE COURT: Because exclude -- because pending  
2 inventory is excluded, it's not excluded in the valuation  
3 methodology. It's just excluded from the acquired  
4 inventory, which you valued all the same way?

5 MR. FRIEDMANN: Look, I -- our view is that the  
6 parties came up with a peg. Again, it's the same point, I  
7 think, even though it wasn't terribly excessively made,  
8 apparently, previously, but they came up with a peg at \$147  
9 million dollars as what the company had. The question was,  
10 we're buying this company, what does it have right now, so  
11 that we can make sure that, in the next 25 days you operate  
12 in the ordinary course and we get the same thing that we  
13 think we're buying. And they determined that what the  
14 company had, using the company -- based on the company's  
15 books and records, at the day that the APA was executed, was  
16 \$147 million dollars of prepaid inventory.

17 It was then incumbent upon the Debtor to deliver  
18 that amount 25 days later at close. But to figure out  
19 whether or not they delivered what they sold when they  
20 executed the APA, you've got to measure it the same way.

21 THE COURT: Okay. I guess what I'm saying is,  
22 inventory value, that defined term, is consistent with the  
23 seller's current and historical accounting practice. That's  
24 how it has (indiscernible) inventory value is a defined  
25 term. When you go to prepaid inventory shortfall amount, it

1 doesn't use the term, "inventory value".

2 MR. FRIEDMANN: It does not.

3 THE COURT: It just says an amount equal to \$147  
4 million less the amount of prepaid inventory, and that shall  
5 mean all inventory has been paid, and I just want to make  
6 sure, when we say inventory, inventory shall mean not  
7 inventory value, but inventory shall mean goods reflected on  
8 the stock ledger of the seller.

9 MR. FRIEDMANN: To be honest, it's a bit of a  
10 misnomer with respect to prepaid inventory because prepaid  
11 inventory isn't actually on a stock ledger yet.

12 THE COURT: Right, so, it just seems to me that  
13 the valuation point actually, here is -- I understand that  
14 the parties used a number, \$147 million, that came off of  
15 the company's books which didn't have on them the  
16 calculation that he didn't want to get.

17 MR. FRIEDMANN: Of course not.

18 THE COURT: So -- but I'm not sure that fits into  
19 the definition of prepaid inventory shortfall. Now, maybe  
20 it does.

21 MR. FRIEDMANN: Well, the prepaid shortfall  
22 inventory requires us to provide amounts equal to \$147  
23 million dollars, and the question is, what's the  
24 methodology? And it does not state a methodology. We can  
25 agree on that, so the question is --



1 THE COURT: Right, in the (indiscernible) method  
2 defined term, "inventory value" but it could have easily  
3 said, shall mean an amount equal to \$147 million, less the  
4 amount of prepaid inventory as of the closing date,  
5 calculated as per the inventory value. It doesn't say that.

6 MR. FRIEDMANN: Absolutely, Your Honor, and in  
7 retrospect, that would have made this clearer. Instead,  
8 what we're forced to focus on is what would the reasonable  
9 expectations of the parties is, it certainly --

10 THE COURT: But can we just go by what the  
11 document says?

12 MR. FRIEDMANN: Well, the document doesn't say how  
13 to calculate it. The document just says \$147 million  
14 dollars of prepaid inventory.

15 THE COURT: Right, okay.

16 MR. FRIEDMANN: And that \$147 million dollars, the  
17 only way that that -- the company, so we have to look at  
18 what the ordinary course was in the company, whenever the  
19 company was reporting on what their prepaid inventories  
20 amount were in the pre-petition period, during the post-  
21 petition period, they were always doing the same thing.  
22 They were taking this -- they were doing this calculation  
23 based off their books and records. The only time it was  
24 ever calculated a different way is when, after the close,  
25 Ernst & Young is hired to come in and say, hey, can you come

1 in and take a look at this and see if you can get a number  
2 down, because then we get a dollar-for-dollar set-off?

3 That's the only time anybody did that. No one  
4 suggested, at the time of the execution of the APA that,  
5 look, if we're going to set a peg, let's figure out what's  
6 really in the company right now, and let's bring in Ernst &  
7 Young and maybe we'll close this deal four months from now,  
8 because we couldn't do that. There was no time for it.  
9 They had to rely on the available methods under the  
10 circumstances. Here, as Your Honor will remember from the  
11 sale hearing, this deal had to get done quickly or 45,000  
12 people or so were out of a job because we were liquidating.  
13 They had to come up with saying, what does this company look  
14 like right now, because that's what you're going to have to  
15 deliver to us in a really short period of time, maybe the  
16 time between the execution and the close here is nigh.

17 THE COURT: I think you could -- we couldn't even  
18 say that the \$147 million-dollar number, because that's the  
19 best number they had at the time, but they didn't,  
20 certainly, say that they were going to follow that same  
21 approach.

22 MR. FRIEDMANN: If they had all the time in the  
23 world, Ernst & Young could have been hired then and come up  
24 with what the specified receivable amount -- I'm sorry, what  
25 the prepaid inventory amount was then, and they could have

1 negotiated over whether or not that was reasonable, but --

2 THE COURT: But they also could have said, this is  
3 how we would do it. Anyway --

4 MR. FRIEDMANN: And they failed. There's no doubt  
5 that they failed to set forth a specific methodology so  
6 instead, we're forced to live with whatever the reasonable  
7 expectations of the parties were then, and there was not a  
8 single person who could possibly probably testify that when  
9 they sat there negotiating this APA, the way they were  
10 thinking about prepaid inventory being negotiated is what  
11 Andrew Hede would come up with two or three months later.

12 THE COURT: When was he hired?

13 MR. FRIEDMANN: I think he testified it was after  
14 the close. I don't know what the timing was. It certainly  
15 was -- he was not hired prior to the APA being assigned.

16 MAN: When did they hire Ernst & Young?

17 MR. FRIEDMANN: After closing.

18 MAN: It was pre-closing.

19 MR. FRIEDMANN: Pre-close?

20 (Overlapping voices)

21 MR. FRIEDMANN: Post-execution, pre-close?

22 THE COURT: All right.

23 MR. FRIEDMANN: So, after the negotiation was set  
24 and after \$147 million was set as a peg.

25 THE COURT: Well, that may just be -- there was

1 not a mutual mistake, they were just (indiscernible).

2 MR. FRIEDMANN: Well, because the (indiscernible)  
3 this methodology, they didn't come up with until later. He  
4 testified in April. For some reason, I remember hearing  
5 that.

6 THE COURT: Okay.

7 MR. FRIEDMANN: Thank you.

8 THE COURT: Okay. Before we -- I'm sorry, go  
9 ahead and sit down. Mr. Good testified that the company  
10 really hasn't been able to vet the Excel spreadsheet to do  
11 the due diligence. He got it recently. Whether it had the  
12 ability or didn't have the ability to meet with people to  
13 look into merch and non-merch and those sorts of things,  
14 that hasn't been done yet. I didn't get the impression that  
15 -- though that E&Y's methodology is, on its face, improper  
16 or inaccurate or -- (indiscernible).

17 MR. FRIEDMANN: Look, I don't know that it is,  
18 however, we're not suggesting that it is. I think what our  
19 concern is, certainly with some of the judgments they have  
20 to make, the one Mr. Good referred to about merch versus  
21 non-merch, particularly in light of the fact that both Mr.  
22 Riecker and Mr. -- I'm going to mispronounce his name, I  
23 apologize. Mr. Butz, both testified that they'd been  
24 isolated from E&Y. So, there's been this effort for, you  
25 know, whatever reason, I don't want to assume that there is

1 intent, but for E&Y to do this calculation and make these  
2 judgments without talking to the two people most  
3 knowledgeable about this information, so, because of that,  
4 look, E&Y is obviously a very reputable firm. They've been  
5 siloed off from talking to the people who most would be able  
6 to help them make those judgments, for whatever reason, and  
7 that would give us very -- that would give us pause to  
8 accept their analysis.

9 THE COURT: Do you have the same issue here as in  
10 the payables? I mean, I'm sorry, as in the accounts  
11 receivable where you used a, in essence, a GAAP methodology  
12 and E&Y is using an actual methodology, and in doing so,  
13 they're not crediting you with -- or they're starting with  
14 just your numbers and not your (indiscernible)? Or maybe we  
15 don't know.

16 MR. FRIEDMANN: What they're working off of, the  
17 books and records of the company, they're doing the  
18 methodology different. As you heard, we were using the  
19 methodology that the company was using throughout the post-  
20 petition period, which was this three-week analysis. E&Y  
21 (indiscernible) to do a six-week analysis. They've had the  
22 benefit of months and months and months to try to figure  
23 this out. I don't know, again, if there is an exact,  
24 precise count and I think that's difficult, given the fact  
25 that there's always goods that are on ships from China or on

1 trucks going to stores.

2 Again, the idea was, what's the best available  
3 information that the companies had at the time of execution,  
4 and then what is the reasonable expectation of the parties?  
5 From the perspective of Transform, the reasonable  
6 expectation was, we're going to get exactly what we think  
7 we're buying. We're looking at the company right now, we've  
8 diligence-d it, you're going to deliver that to us 25 days  
9 from now, and if you deliver less, we're going to get right  
10 for that. And for us, it was, when that's going to be  
11 measured, we're going to use the same stick.

12 THE COURT: You use it most often in this  
13 argument. The reasonable expectations of the parties. How  
14 does that fit in as a legal concept? Does that fit in if I  
15 find it either ambiguous, or is this a way -- I understand  
16 that -- I understand the concepts of mutual mistake and  
17 unilateral mistakes. I don't understand the reasonable  
18 expectations of the parties point. I'm not sure -- I'd put  
19 it in, I'm not sure how you're mediated. Do I have to find  
20 this provision to be ambiguous before I advise?

21 MR. FRIEDMANN: Your Honor, it's ambiguous to the  
22 extent that it does not support the methodology. We -- I  
23 don't know that that's ambiguous. To the point, I think  
24 it's clear. It doesn't set forth the methodology.

25 THE COURT: Well, we may then just assume that --

1 we just -- a reasonable accurate methodology? I mean, I --  
2 I don't have the sense that the methodology that the company  
3 has used is the most accurate methodology.

4 MR. FRIEDMANN: No, it's not the most accurate,  
5 but again, it wasn't -- the key wasn't getting -- it wasn't  
6 as though there's some magic to \$147 million dollars of  
7 prepaid inventory. The magic is getting the -- it's -- the  
8 shortfalls are the key. The key is that what we had at the  
9 time of execution, we'd have at the time of closing, and  
10 then if there was any difference, there would be a credit.  
11 It could have been pegged at \$120, it could have been pegged  
12 at \$97. The point is, whatever it was the day of execution,  
13 was what we had to deliver. And that's why it being  
14 precisely -- so, when we had it at \$147, it turned out that  
15 if Andrew Hede had come in three months before instead of  
16 three months after to do his analysis, he would have said,  
17 oh, it's not really \$147, it's really only \$79 million.

18 Okay, the same point would have been, well, then,  
19 we've got to deliver \$79 million under the Hede methodology,  
20 and the same set-off would be in place, because if we missed  
21 that, it'd be dollar-for-dollar. So, the \$147 is just a peg  
22 to make sure that we're not doing anything differently in  
23 those 25 days, and we're not suddenly not running the  
24 company properly, or looting it, and they're getting a worse  
25 deal than they think they signed. They were getting exactly

1 what they bargained for, and if there was any difference,  
2 they'd get the shortfall. But it's not fair to apply that  
3 to the Debtors when you come in and you're measuring the  
4 shortfall using a totally different stick. And that's the  
5 problem, because that upsets the reasonable expectations of  
6 the Debtors, and that's where it comes in.

7 THE COURT: Okay.

8 MR. FRIEDMANN: Thank you, Your Honor.

9 THE COURT: Okay.

10 MS. MAINOO: Your Honor, I'll try to cut to the  
11 chase. Mr. Friedmann argued that no one expected that, in  
12 the course of negotiations, that the prepaid inventory  
13 shortfall would be calculated other than using the company's  
14 accounting records. But Mr. Kamlani testified that this is  
15 what he expected. And if you'll indulge me, I will cite to  
16 Mr. Kamlani's declaration on which he says, in Paragraph 38,  
17 that Transform could only get incremental value from  
18 inventory if the inventory was received and was not part of  
19 the on-the-stock ledger at the time of closing, but became  
20 part of the ledger thereafter. Transform bargained for  
21 inventory and not for an estimate of inventory.

22 Mr. Kamlani goes on to say that he understands  
23 that, since the closing, Debtors have taken the position  
24 that they are not required to deliver \$147 million of  
25 prepaid inventory, but that it is sufficient that Debtors'



1 accounting records reflect that they have \$147 of prepaid  
2 inventory in the books. "This was not the transaction I  
3 negotiated," Mr. Kamlani says, and Transform would never  
4 have agreed to that transaction, which would have given  
5 Debtors and Debtors alone the right to set the amount of  
6 inventory without there being any opportunity for there to  
7 be account after the transaction closed.

8 THE COURT: Although, they do have the ordinary  
9 course obligation, so they couldn't do it, play games with  
10 it.

11 MS. MAINOO: Can you clarify your question, Your  
12 Honor?

13 THE COURT: Well, the last part, which you read  
14 Mr. Kamlani says the reason, right, that he would never  
15 agree to letting the company use its accounting methodology  
16 is that in (indiscernible) control of the company, that  
17 that's tempered by the fact that the company has to act in  
18 the ordinary course.

19 MS. MAINOO: And (indiscernible) requires that the  
20 ordinary course prevention mitigates against that, and as  
21 you know, we have issues with respect to the ordinary  
22 course, as well. But Mr. Kamlani also explains that if the  
23 Debtors were, indeed, correct that it was sufficient to rely  
24 on their accounting records to establish a prepaid inventory  
25 amount, then there would have been no need for an adjustment

1 mechanism in the APA to reduce this Debtors' reimbursement  
2 obligations and assume 503(b)(9) liabilities. The sole  
3 reason that the APA included that provision -- this  
4 provision, excuse, was so that Transform could do account of  
5 the inventory after the close to ensure that the amount of  
6 inventory Debtors said they would deliver was, in fact, what  
7 was delivered. To the extent that the amount the inventory  
8 was short, this adjustment mechanism provided for an offset.

9 THE COURT: Well, I mean, there isn't -- there  
10 clearly is an adjustment mechanism, but couldn't he just as  
11 logically say that this, as Mr. (indiscernible) says, that  
12 this is just to prevent the Debtors' inventory from a  
13 measure anyone understood, from going down, as opposed to  
14 measuring it in a different way? I mean, they did come up  
15 with \$147 million, and it wasn't a (indiscernible) warranty.  
16 So, I guess the point is, what's really a function of the  
17 shortfall? Is it inventory-based, or is it basically the  
18 ordinary course base to a regularly based?

19 MS. MAINOO: And Mr. Kamalani testified that it was  
20 inventory-based. Debtors had a chance to cross-examine him,  
21 they did not. But I think Your Honor's question also goes  
22 to what did the APA contemplate? And the APA provisions  
23 contemplate that the prepaid inventory shortfall would be  
24 calculated and not assumed. Pursuant to § 2.1(x), Transform  
25 bargained for the right to receive prepaid inventory. And

1 prepaid inventory is defined in the APA as: "all inventory  
2 paid for by the Sellers prior to the closing date, as to  
3 which the Sellers have not taken title or delivery as of  
4 closing." The reason it was important to --

5 THE COURT: And "inventory" there isn't accounting  
6 inventory, it's the real thing.

7 MS. MAINOO: Exactly. And that is -- Mr. Hede  
8 testified before, you can sell a fridge. You cannot sell an  
9 accounting entry.

10 Another point to touch on in response to Debtors'  
11 arguments is about the methodology that they said they used  
12 and that they said the understood the parties had a shared  
13 understanding with respect to. First, the Debtors suggest  
14 that this so-called methodology of using the accounting  
15 estimate to estimate or approximate prepaid inventory was  
16 the methodology used all along by the company. One point  
17 Mr. Hede also spoke to earlier, and testified to, was that  
18 the company, in fact, changed its own practice from two to  
19 three weeks during the bankruptcy. So, that the lies, the  
20 suggestion that --

21 THE COURT: Is the going from three to six, how  
22 does that affect -- does it really -- who benefits from  
23 that?

24 MS. MAINOO: Is that a question for me, Your  
25 Honor?

1 THE COURT: It's for everyone. Both sides. Going  
2 six (indiscernible) right?

3 MS. MAINOO: Yes. Right, and Mr. Hede expanded --  
4 he used the six weeks to be conservative for the benefit of  
5 the Debtors.

6 THE COURT: Right, okay.

7 MS. MAINOO: Another reason that the actual  
8 inventory is critically important is that the \$147 million  
9 that Transform was supposed to receive in prepaid inventory  
10 was important for Transform's financing.

11 THE COURT: Well, I had a question about that, and  
12 I confess, I haven't read the deposition excerpts yet. But  
13 as far as the financing is concerned, is there anything in  
14 the record as to whether the lenders were looking at  
15 accounting/financial reporting type of methodology for the  
16 inventory, or actual account?

17 MR. LIMAN: Your Honor, if I may, I can answer  
18 that question.

19 THE COURT: Okay.

20 MR. LIMAN: It was in the actual count there is in  
21 the record the documents given to the banks. Those look at  
22 cash flows, not at GAAP accounting. The cash flows build  
23 into the models the notion of \$147 of prepaid inventory.  
24 So, it's not GAAP accounting, it's not the notion of what's  
25 a GAAP liability with GAAP calculations. It's \$147 million

1 of inventory into the cash flow statements. And Mr. Kamlani  
2 actually could testify to it.

3 THE COURT: It was actual inventory?

4 MR. LIMAN: Actual inventory. Mr. Kamlani is here  
5 and he could answer those questions if Your Honor has them,  
6 but that is built into the model that was given to the  
7 lenders, and that's why the figure of \$147 million, it's not  
8 just ordinary course.

9 THE COURT: Do we have the -- we don't have the  
10 loan agreement, right?

11 MR. LIMAN: We don't, but the exhibit that  
12 reflects the calculations is in the record. I don't know  
13 offhand the number.

14 MR. FRIEDMANN: The documents also -- the  
15 obligations are not contingent upon the debt financing.

16 THE COURT: No, I understand that. I'm just --  
17 the deal requires -- but just react to the comment that the  
18 \$147 is important to the financing.

19 MR. FRIEDMANN: To be clear, the lenders were  
20 lending on inventory, and the inventory numbers they were  
21 getting were right from the books. There was no Ernst &  
22 Young doing this analysis when they were (indiscernible).

23 THE COURT: No, but I -- I think my question went  
24 to whether the lender's covenant, or borrowing base, or  
25 however they formulate it, was based on a number of \$147 or

1 something in that neighborhood that was premised on a GAAP  
2 calculus of that number, or actual inventory, which they  
3 have the right to go and audit, just like any market.

4 MR. FRIEDMANN: They based on GAAP, Your Honor.

5 THE COURT: How do we know that?

6 MR. LIMAN: That's -- that -- excuse me, that's  
7 just not collected.

8 THE COURT: Well, (indiscernible). Where is that  
9 in the record? How do I know that?

10 MR. FRIEDMANN: It is in GAAP (indiscernible).

11 THE COURT: No, I'm asking -- you told me where  
12 yours is. I bet they didn't -- where that statement came up  
13 from the Debtors' counsel.

14 MR. SCHROCK: Your Honor, it's Ray Schrock, for  
15 the record. So, I presume that the lenders do have, in  
16 fact, the ability to go back and count inventory. You know,  
17 they always do. They conduct appraisals and the lender  
18 would have the ability to do that. My points was just that  
19 I looked at it in the agreement as an allocation of  
20 (indiscernible).

21 THE COURT: No, I understand that. I think that's  
22 a -- I understand your point, too, but I just wanted to make  
23 --

24 MR. SCHROCK: Okay, understood. I think it's  
25 (indiscernible) the lenders, I'm sure, have the ability to

1 go count inventory. I'm sure -- we can stipulate to that.

2 THE COURT: I know. These provisions don't  
3 exactly tally up, but when we're -- what the -- the real  
4 argument you're making, as (indiscernible) is making to me,  
5 is that this was the expectations of the parties, and making  
6 a list of why it really was the expectations of the parties  
7 and why it was that this \$147 million is important for the  
8 lending relationship. And I think, based on reality as  
9 opposed to GAAP, is the case.

10 MS. MAINOO: Your Honor, Debtors also argued that  
11 the fact that EY did not work with Mr. Riecker or Mr. Butz  
12 somehow undermines the methodology that EY used. But EY,  
13 the declaration that Mr. Hede submitted, in his declaration  
14 he testifies that EY worked closely with Sears, with  
15 Treasury and Inventory Management teams to develop the  
16 methodology and compile the data and analysis that it  
17 (indiscernible) inventory.

18 THE COURT: (indiscernible) but this is all --  
19 when was this provided, when was the Excel spreadsheet  
20 provided?

21 MS. MAINOO: I -- a couple minutes to look into  
22 that, Your Honor.

23 THE COURT: I think it was in July.

24 MS. MAINOO: Which Excel spreadsheet specifically?

25 THE COURT: The outcome of the analysis.

1 MS. MAINOO: So you're saying, when was it shared  
2 with M-III?

3 THE COURT: Yeah. I know they had discussions  
4 along the way, but I think it was provided quite recently,  
5 wasn't it?

6 MS. MAINOO: No, but I'm making the separate  
7 point, right, the Debtors seem to be arguing that Ernst &  
8 Young should have consulted with the company, with Rob  
9 Riecker and Jeff Butz at Sears and my point is that Ernst &  
10 Young did consult with Sears's finance team.

11 THE COURT: Some of them.

12 MS. MAINOO: With the Treasury and Inventory  
13 Management teams.

14 THE COURT: Okay.

15 MS. MAINOO: Just a minute. Mr. -- as you heard,  
16 Your Honor, Mr. Hede testified, and there is no reason to  
17 question the methodology that he used or his matching  
18 process. And again, Debtors had the opportunity to  
19 (indiscernible).

20 THE COURT: Mr. Hede said -- well, there is,  
21 because the Debtor was seeking backup.

22 MS. MAINOO: Mr. Hede -- Mr. Good testified that  
23 its nuances suggested that it's really hard to do that work.

24 THE COURT: Right.

25 MS. MAINOO: But that did not question the



1 integrity of that office (indiscernible).

2 THE COURT: Has Mr. Hede been deposed?

3 MS. MAINOO: The Debtors did not notice Mr. Hede's  
4 deposition.

5 THE COURT: Okay.

6 MS. MAINOO: And they had an opportunity --

7 THE COURT: When was the last date for  
8 depositions?

9 MS. MAINOO: June 21st was the cutoff for  
10 discoveries.

11 THE COURT: And when did he provide his Excel  
12 analysis?

13 MS. MAINOO: He put in two declarations.

14 MR. FRIEDMANN: Your Honor, I can represent that  
15 we received of (indiscernible) of several hundred files  
16 about an hour before discovery closed -- (indiscernible)

17 THE COURT: On the 21st?

18 MR. FRIEDMANN: So -- yeah, so the --

19 THE COURT: Okay, so --

20 MR. FRIEDMANN: -- we didn't have the opportunity  
21 for that deposition, unfortunately.

22 THE COURT: Okay.

23 MS. MAINOO: But we also had that compressed  
24 discovery schedule at the Debtors' request, and Debtors --  
25 (indiscernible).

1 THE COURT: No, I understand all of that. I just  
2 -- I think there's a bit of a -- I accept Mr. Good's  
3 testimony that probably, he had an ongoing obligation, which  
4 they have been honoring in fits and starts, to work with  
5 each other, and I also accept, although he didn't say this,  
6 that that has been interrupted by the differences in legal  
7 interpretations that they had taken. And I understand that.  
8 There's no reason to do Work Stream X if you believe Work  
9 Stream X is completely irrelevant. Or, you know, to spend a  
10 lot of Sears' money and extend the discovery deadline to vet  
11 Work Stream X if you think it's irrelevant.

12 MS. MAINOO: Your Honor, (indiscernible) further  
13 questions.

14 MR. LIMAN: Your Honor, just for the record, I  
15 made reference to a document. It's Joint Exhibit 32A and  
16 it's the page having to do with monthly budget and a 2020 --

17 THE COURT: This is the presentation to the lender  
18 group or the lender agent?

19 MR. LIMAN: Correct, correct. Reflecting the 148  
20 million, actually, in inventory.

21 THE COURT: Okay. Anything more on this.

22 MR. LIMAN: No, Your Honor.

23 THE COURT: Okay. The next issue that I'll  
24 address is the parties' dispute over how to calculate a term  
25 defined in Section 121 Page 27 of the APA, namely, Prepaid

1 Inventory Shortfall amount. That is defined as "Shall meet  
2 an amount equal to \$147 million, less the amount of the  
3 prepaid inventory, as of the closing date." That calculus  
4 then ties into another crediting mechanism in Section 2.3K  
5 little Roman ix of the APA.

6 This is not as easily determined on the face of  
7 the agreement as the dispute over Specified Accounts  
8 Receivable, given the language of this provision. I say  
9 that because the whole issue here is how to value the  
10 prepaid inventory, a term that actually doesn't even appear  
11 in the definition. It just says "the amount of prepaid  
12 inventory." Although both sides, I believe, interpret the  
13 word amount as equating to value. They just disagree on how  
14 to value it. The Debtors value it based on their ordinary  
15 course of valuation methodology for inventory, which is  
16 GAAP-based and financial reporting-based.

17 They say that it is -- on that basis, that the  
18 parties came up with a \$147 million trigger amount or  
19 threshold amount and that, therefore, it should be used to  
20 calculate the actual amount in this section. The  
21 (indiscernible) transform is that the Debtors know how to  
22 specific, as did Transform -- the parties, therefore, knew  
23 how to specify that type of valuation methodology because  
24 they used it in the definition of inventory value, another  
25 defined term that appears on Page 19, which is the value of

1 such inventory at the lower cost or market value on a basis  
2 consistent with the seller's current and historical  
3 accounting practice, in effect, on the date hereof per the  
4 stock lender -- ledger. That doesn't apply here, and the  
5 definition of prepaid inventory shortfall further does not  
6 specify a particular methodology.

7 The Debtors contend, nevertheless, that this is  
8 what both parties understood and that, therefore, that's how  
9 I should read this provision. There's testimony that's  
10 uncontroverted to the contrary by Transform's main  
11 representative, Mr. Kamlani. It seems to me that the  
12 parties knew how to bind themselves to a methodology that is  
13 not necessarily accurate, although perfectly fine for GAAP  
14 and financial reporting purposes, and chose not to. I  
15 assume, therefore, that, as per the plain meaning of the  
16 agreement, a methodology that actually properly reflects the  
17 value of prepaid inventory is what the parties intended.  
18 That's point one.

19 Point two is that Transform contends that Ernst &  
20 Young's calculation of this amount using a methodology tied  
21 to actual inventory and vendor information is, in fact,  
22 accurate. I am not satisfied that that's the case based on  
23 this record. I am reasonably satisfied, however, based on  
24 Mr. Good's testimony as well as Mr. Hede's, that the  
25 methodology could be sufficient due diligenced with proper

1 cooperation between the parties with the right people  
2 involved to address any judgment calls and otherwise due  
3 diligence to methodology, which I don't think the Debtors  
4 have had an opportunity to do, given what's been delivered  
5 to them. And reasonable assumptions as to whether they  
6 should have dropped everything to do it before now.

7 So, as a legal matter, I conclude that the GAAP  
8 financial reporting approach is not the approach that is  
9 intended by the plain meaning of the document. That,  
10 secondly, E&Y's methodology might be an appropriate approach  
11 based on actual valuation approaches but that the Debtors  
12 should be entitled to due diligence. And, again, the  
13 parties have ten days to do that. And, if not, it'll be  
14 part of an examiner's job to do that.

15 And, again, I don't think -- I think -- I'll put  
16 it differently -- I think Mr. Hede's testimony establishes  
17 in my mind that there's no apples and oranges risk here as  
18 there is with the specified accounts receivable. But,  
19 obviously, if the Debtors' GAAP approach actually left out  
20 prepaid inventory, it should come in because now we're using  
21 their real life actual numbers approach, and that should be  
22 part of the due diligence and the ultimate calculation.

23 Okay. Does anyone want to take a short break  
24 since we've been at this for four hours?

25 MAN 1: Please, Your honor.

1 THE COURT: Okay. Why don't we take about a ten-  
2 minute break?

3 (Recess)

4 THE COURT: Okay, we're back on the record in In  
5 Re: Sears Holding Corp. As far as remaining issues are  
6 concerned, I think we have on this list adequate assurance  
7 deposit, ADA funds, available cash, ordinary course, and 166  
8 million issue.

9 MR. FRIEDMANN: I don't if you said mechanics  
10 liens, Your Honor.

11 THE COURT: Sorry?

12 MR. FRIEDMANN: Did you say mechanics liens?

13 THE COURT: Oh. Did I miss mechanics liens?  
14 Okay, I missed mechanics liens.

15 MR. FRIEDMANN: It's always the forgotten one.

16 THE COURT: Yes, mechanics liens.

17 MR. FRIEDMANN: If I can make a proposal, Your  
18 Honor?

19 THE COURT: Okay.

20 MR. FRIEDMANN: Especially given the time. We  
21 would propose to do -- we can do (indiscernible) thought --  
22 we can do 166 ordinary course and available cash altogether  
23 because they really all relate to each other. So, if we can  
24 address that next, then we'll just be left with the other  
25 three, which all that should be pretty quick.

1 THE COURT: Okay, that's fine.

2 MR. FRIEDMANN: Great. So, Your Honor, with  
3 respect to the \$166 million accounts payable dispute, as  
4 Your Honor I'm sure remembers, Your Honor provided a summary  
5 ruling on this issue back on February 7th. Since that time,  
6 some 61 pages later, the litigating issue has consumed an  
7 extraordinary amount of the Debtors' time and limited  
8 resources. But at the end of the day, the buyer's evermore  
9 lengthy, convoluted, at times colorful arguments on the  
10 issue cannot prevail. Because, very simply, 2.3K of the APA  
11 is ambiguous. The Court suggested it agreed with that at  
12 the sale hearing on February 7th and even the buyer at the  
13 conference on Tuesday afternoon, Mr. Liman, counsel for  
14 Transform, also stated that he believes 2.3K is clear -- of  
15 course, in Transform's favor.

16 Accordingly, under black letter Delaware law, the  
17 Court should not look beyond the four corners of the APA to  
18 determine the parties' intent with respect to the meaning of  
19 Section 2.3K. 2.3K unambiguously obligates the buyer to  
20 assume both up to \$166 million of other payables and all  
21 payment obligations with respect to ordered inventory.  
22 These two categories of obligations are listed as separate  
23 obligations in Section 2.3 of the APA, they're defined  
24 separately in the APA they're set forth in separate  
25 schedules of the APA. 1.1F sets forth ordered inventory,

1 1.1G sets forth other payables.

2 And Your Honor recognized exactly as much at the  
3 February 7th sale hearing when you stated that it's  
4 reasonable to assume that the Debtors' interpretation of 2.3  
5 would prevail in a proper litigation because the two  
6 categories of obligations are listed as separate obligations  
7 in 2.3 -- in Section 2.3 of the APA, it's defined separately  
8 in the APA, and because 2.3K little v's cap of 166 million  
9 applies only to other payables and to all payment  
10 obligations with respect to the order inventory.

11 Notwithstanding, the unambiguous terms of Section  
12 2.3K of the APA and Your Honor's prior determination at the  
13 sale hearing, the buyer maintains that Section 2.3K sets  
14 forth only three categories of obligations and not four.  
15 One being the severance reimbursement obligation, two being  
16 the assumed 503B9 liabilities, and three being this other  
17 payables and all payment obligations with respect to the  
18 order inventory all combined.

19 Essentially, the buyer argues that the APA is only  
20 obligated to assume up to 166 million payables with respect  
21 to ordered inventory. And in support of that argument, the  
22 buyer asserts that the limiting phrase or modifier with  
23 respect to the order inventory modifies the term "other  
24 payables".

25 But other payables is defined as accounts payable



1 as set forth in 1.1G. And that's why this argument really  
2 defies law and logic and in many respects the English  
3 language. And I know there's been a lot of talk about the  
4 last antecedent rule, and Oxford commas and definite  
5 articles, and coordinating conjunctions. But the bottom --  
6 at the bottom of it all is, Your Honor, the buyer's  
7 interpretation of the APA has to make sense, and it doesn't.

8 As an initial matter, there are no accounts  
9 payable associated with ordered inventory. Ordered  
10 inventory in the AP is inventory that the seller has ordered  
11 but has neither paid nor taken title to or delivery of.  
12 Under basic double entry bookkeeping methods, and the Sears  
13 team used those, the Sears team did not enter such inventory  
14 into the company's general ledger.

15 As Mr. Riecker, who at the time was the Debtors'  
16 CFO and is now the buyer's CFO, admitted in this deposition  
17 order inventory is not booked into Sears financial systems  
18 or accounted for in the company's financial statements. Mr.  
19 Riecker also admitted that ordered inventory is at most a  
20 plan to at some point in the future receive Title Two  
21 inventory that the company has not yet paid for.

22 Mr. Kamlani, ESL's president, also stated in his  
23 deposition that ordered inventory is nothing. It's at 60 --  
24 Page 64, Lines 8-11 in Mr. Kamlani's deposition. Because  
25 none of the goods that comprise ordered inventory were

1 associated with accounts payable, the phrase with respect to  
2 ordered inventory cannot modify other payables, and the  
3 buyer's argument fails.

4 Also, as I mentioned, there are two separate  
5 schedules. If the buyer's obligations with respect to other  
6 payables or a subset of its obligations with respect to  
7 ordered inventory that the buyer claims, there would've been  
8 no need for the parties to have included two separate  
9 schedules reflecting -- and one reflecting the other  
10 payables at all. In fact, how is it that the buyer could be  
11 at the same time agreeing to pay only up to a cap of \$166  
12 million for something that it also agreed to assume all  
13 payment obligations for with no maximum whatsoever? Your  
14 Honor, the answer is simple. It's because the buyer agreed  
15 to assume two different things.

16 The buyer also argues that Section 2.3 sets forth  
17 three obligations instead of four because the APA does not  
18 provide for a dollar for dollar reduction in the buyer's  
19 obligations with respect to ordered inventory, so the  
20 Debtors deliver fewer assets at closing than was targeted in  
21 the APA, unlike some of the other buyers assumed  
22 liabilities.

23 But the parties would not have provided a dollar  
24 for dollar reduction in the buyer's obligation with respect  
25 to ordered inventory because unlike other payables or

1 severance to reimbursement obligations, or assumed 503B9  
2 liabilities, ordered inventory at the end of the day is a  
3 zero sum game. The buyer's not paying something for  
4 nothing; it's paying something for something. For every  
5 dollar the buyer pays, it receives a dollar's worth of  
6 inventory, inventory that it can then try to sell for \$1.10.  
7 And so it makes sense that the parties agreed that the  
8 buyers should not be entitled to any dollar for dollar  
9 reduction in obligations with respect to the ordered  
10 inventory.

11 Finally, Your Honor, the buyer knew before  
12 executing the APA that the remaining -- that remaining  
13 administratively solvent post-closing was obviously one of  
14 the Debtors' foremost concerns. The buyer's promise to  
15 assume payment obligations with respect to ordered inventory  
16 would not address Debtors' administrative solvency concerns  
17 at all.

18 As Mr. Kamalani stated at his deposition, had the  
19 buyer not agreed to assume payment obligations with respect  
20 to ordered inventory, the Debtors could have canceled all  
21 purchase orders associated with that inventory had had no  
22 associate payment obligations at all. It's just one more  
23 reason why the buyer's argument at Section 2.3K obligates it  
24 to assume only payment obligations with respect to ordered  
25 inventory makes no sense.

1 In conclusion on this point, Your Honor, and as we  
2 set forth further in our brief, the buyer really would have  
3 its cake and eat it too. It wants to acquire substantially  
4 all of the Debtors' assets by promising to assume additional  
5 liabilities, and then over the last several months, we found  
6 it trying to litigate itself out of those promises, ensuring  
7 that those additional liabilities fell to Debtors. But the  
8 ambiguous terms of the APA stand in the buyer's way.  
9 Section 2.3K plainly obligates the buyer to assume both \$166  
10 million of other payables and all payment obligations with  
11 respect to the ordered inventory. The Debtors, therefore,  
12 respectfully request that the Court reject the buyer's  
13 position and grant Debtors supplement motion to enforce the  
14 APA with respect to Section 2.3K.

15 I'll move on to ordinary course, unless Your Honor  
16 has any questions for me about this section.

17 MR. LIMAN: Unless Your Honor wants to hear...

18 THE COURT: Well, I have a question first. Does  
19 the -- does the dispute over the prepaid inventory relate to  
20 this in any way? Have the parties given any thought to  
21 that? No? I'm looking at the puzzled...

22 MR. FRIEDMANN: I'm looking at them. We've been  
23 discussing how things interact a lot lately. I know that  
24 prepaid inventory can actually affect specified receivables,  
25 which should make our discussions very exciting over the

1 next ten days. But it does not -- I don't believe it  
2 affects the accounts payable.

3 THE COURT: Okay. Okay, how closely does  
4 available cash and ordinary course tie into this?

5 MR. FRIEDMANN: The way that they tie in is that  
6 their argument is made in the alternative by the buyer.  
7 They suggest that if it turns out that they are, in fact,  
8 required to do what we say the APA (indiscernible) requires  
9 them to do, which is take on these accounts payable, they  
10 then have argued, one, that we did not break the ordinary  
11 course, and, two, that there was all this available cash  
12 available on 1201 on February 11th, that all should be  
13 offset against the \$166 million.

14 THE COURT: But that's just a... The latter point  
15 is just an offset. It doesn't tie into the --

16 MR. FRIEDMANN: That's correct. That's correct.

17 THE COURT: Okay.

18 MR. FRIEDMANN: So, I'm happy if you want to --

19 THE COURT: So, why don't we deal with the -- it  
20 ties into the formula for the DIP shortfall amount.

21 MR. FRIEDMANN: That's correct.

22 THE COURT: But otherwise, it doesn't tie into the  
23 dispute about the definition of ordered inventory and other  
24 payables and how that works in Section 2.3K. So, why don't  
25 we just deal with that issue then?

1 MR. LIMAN: May it please the Court, Lewis Liman  
2 again. Your Honor, I don't want -- it's late in the day and  
3 I take it I don't have to rehearse the law about preliminary  
4 rulings versus final rulings and the like.

5 THE COURT: I haven't ruled on this issue yet.  
6 There's a ruling on it in the context of whether it made  
7 sense for the Debtors to proceed with the transaction, but I  
8 didn't predict the ultimate -- I didn't decide the ultimate  
9 issue a la Orion Pictures.

10 MR. LIMAN: What I would like to do is give Your  
11 Honor seven reasons why this clause is at least ambiguous.  
12 The APA is at least ambiguous if not -- it reads in favor of  
13 the -- of Transform. But I'd like to start off, before I  
14 get to those seven reasons, with the argument that Mr.  
15 Friedmann concluded with, which had to do with sense. And I  
16 was struck by the argument and struck, frankly, by the irony  
17 throughout the day today on the argument that there's been  
18 all of this argument on various provisions about the  
19 reasonable expectations of the parties and the sense of the  
20 contract, where we've been arguing plain language, plain  
21 language. And on the other side, except for this issue,  
22 we've been hearing reasonable expectations of the parties.

23 THE COURT: Right, they haven't won on those,  
24 though.

25 MR. LIMAN: That's correct, Your Honor.

1 THE COURT: Okay.

2 MR. LIMAN: And they shouldn't have -- and we  
3 should win on the plain language. But let me address the  
4 sense -- because sense is an issue that Your Honor can think  
5 about and consider without parol evidence. You do need to  
6 make sense of a contract. And, Your Honor, the evidence  
7 with respect to this and the -- both the testimonial  
8 evidence and the documentary evidence is very compelling  
9 with respect to what the sense is of this provision. And  
10 I'd like to address that in two ways: What was the sense of  
11 it from the Debtors' perspective? And what was the sense of  
12 it from Transform's perspective?

13 Now, from the Debtors' perspective, what you've  
14 heard today, frankly, is a contrived after-the-fact  
15 explanation. What we were told during the time, and that is  
16 sensible, is that purchase orders for ordered inventory  
17 creates an obligation and it creates a liability. It  
18 creates it as a matter of fact and it creates it as a matter  
19 of contract.

20 The Debtors' concern pre-closing was that they had  
21 an obligation to continue to order inventory in the ordinary  
22 course, and they had an interest in ordering inventory in  
23 the ordinary course. Now, Mr. Friedmann would have you  
24 believe that those purchase orders do not create obligations  
25 and, frankly, that's a falsehood. That's just 100 percent

1 untrue.

2           You don't need the vendor agreements that we put  
3 before Your Honor to know that that's not true. Common  
4 sense says that it's not true. But the vendor agreements  
5 also say when you have a purchase order, there is a  
6 contractual obligation that is created. And that  
7 contractual obligation is one that the Debtors could not get  
8 out of under the terms of the agreement. They would have a  
9 contractual liability. If the vendors delivered, they would  
10 have to take that merchandise.

11           And that plainly created a risk to them. A risk  
12 with respect to administrative solvency, and a risk with  
13 respect to the business. Because they're ordering millions  
14 of dollars of ordered inventory that if the -- that if we  
15 don't take that, it ends up creating a risk from their --  
16 from their perspective.

17           It also -- you heard Mr. Friedmann say all this  
18 stuff about double-entry bookkeeping and the fact that it  
19 doesn't create a liability. That may be true as a matter of  
20 GAAP, but most of what we've been talking about today is as  
21 a matter of contract, and that's what you have to look at as  
22 a matter of contract. And if you look at the definition of  
23 liability, this ordered -- obligations with respect to  
24 ordered inventory plainly creates a liability under the APA  
25 -- under the APA's definition of liability, which includes



1 claims that can be unaccrued and contingent.

2 Two other things I want to correct with respect to  
3 the record that I want to get to.

4 THE COURT: How does that help your cause?

5 MR. LIMAN: Well, because I think the -- their  
6 argument with respect to sense turns on the notion that they  
7 were not getting anything from an agreement on our part to  
8 take on payables and payment obligations with respect to  
9 ordered inventory. I don't understand that argument,  
10 frankly.

11 THE COURT: I think it's more that they're not  
12 getting the inventory.

13 MR. LIMAN: Excuse me?

14 THE COURT: I thought it was more that they  
15 weren't getting the inventory. That it was going to the  
16 buyer eventually.

17 MR. LIMAN: Well, I think their -- I think their  
18 argument, as I understand it, is they're not getting  
19 anything from it. They did make an analogy about double-  
20 entry bookkeeping and liability, and I just wanted to  
21 correct that for the record because that statement, Your  
22 Honor, is untrue. But there is a risk from their  
23 perspective.

24 THE COURT: But is the ordered inventory, by in  
25 large, something that the Debtor gets to keep the benefit of

1 under this transaction?

2 MR. LIMAN: It's something that the Debtors, but  
3 for this provision, could have been stuck with. And rather  
4 --

5 THE COURT: Well, they could have but then they'll  
6 say they negotiated this provision so they weren't.

7 MR. LIMAN: They say they're not worried about  
8 that. What I say, Your Honor, and what they said at the  
9 time is that if they were -- if we decided not to take  
10 ordered inventory, they're stuck with it. And let me direct  
11 your attention to this part of the record, Kamalani's  
12 testimony, deposition testimony, Pages 77-78.

13 He was asked whether from your perspective,  
14 Transform's agreement to assume liabilities of 166 million  
15 in payables and payment obligations for ordered inventory  
16 of, roughly, 166.5 million would help with Debtors'  
17 insolvency. He recalled being asked those questions.

18 Question: In your mind, would Transform's  
19 assumption of liability for 166 million in payables and  
20 payment -- payable obligations for ordered inventory of  
21 166.5 million have helped the Debtors' administrative  
22 insolvency issues?

23 Answer: The Debtors were trying to achieve  
24 Transform taking on assets and liabilities because they were  
25 concerned that if they kept the assets and liabilities as

1 they sold the assets, what they received for them may well  
2 fall short of the 166.5 million because they were not in the  
3 business of selling the assets.

4 I'll break from the testimony for a second. They  
5 have going out of business operations. If they get  
6 inventory, it's not worth very much to them. Question --

7 THE COURT: Well, but -- under this agreement, who  
8 gets the inventory?

9 MR. LIMAN: Under this agreement, we get the -- we  
10 get the inventory, we take on the obligations. But for  
11 this agreement, but for this clause, we would have the right  
12 to say we don't want that inventory and they would be stuck.  
13 That's what it achieved from their perspective.

14 THE COURT: But that's not what the parties  
15 bargained for.

16 MR. LIMAN: What the parties bargained for --  
17 correct.

18 THE COURT: Is that your client would take on the  
19 inventory.

20 MR. LIMAN: What the parties bargained for was  
21 that we would take on the inventory and we would take on the  
22 payables and payment obligations with respect to that  
23 inventory. I was addressing, Your Honor -- and let me just  
24 make sure I've addressed it --

25 THE COURT: Well, to me, that justifies why that

1 obligation is unlimited and there's a cap on the other one.

2 MR. LIMAN: It's not unlimited, Your Honor.

3 THE COURT: Okay.

4 MR. LIMAN: It's limited by -- to 166 million.

5 It's limited to 166 million by the provisos to 2.3K.

6 THE COURT: But as far as the sense of the  
7 agreement goes, that doesn't make any sense.

8 MR. LIMAN: It does, Your Honor.

9 THE COURT: If your client has the right to take  
10 the whole shooting match --

11 MR. LIMAN: We don't --

12 THE COURT: -- and is taking the whole shooting  
13 match, then it should pay for it.

14 MR. LIMAN: We don't have the right to take the  
15 whole shooting match, Your Honor. We only have the right to  
16 take the shooting match up to what was calculated as of  
17 January 9th to be 166.5. That's in the schedule and we,  
18 obviously, in the ordinary course have been fluctuating  
19 around that number. We don't have the right to all of the  
20 ordered inventory. We have the right to what we assume, and  
21 under the APA, we've got the right to be -- all we've got  
22 the right to as to ordered inventory is the 166.5,  
23 approximately.

24 THE COURT: Where is that? Is that in the Assets  
25 Purchased?

1 MR. LIMAN: It is Section 2.1...

2 THE COURT: 2.1?

3 MR. LIMAN: X. We receive the right to receive  
4 the pending inventory. You have to do a little bit of work  
5 through this agreement.

6 THE COURT: Okay. And so pending inventory means  
7 the ordered inventory and the prepaid inventory --

8 MR. LIMAN: And then you go to the definition of  
9 ordered inventory, which then takes you to the -- to  
10 Schedule 1.1F, which takes you to the schedule that has the  
11 --

12 THE COURT: Right. But it says "of the type".

13 MR. LIMAN: It does say "of the type", Your Honor.

14 THE COURT: Right.

15 MR. LIMAN: Your Honor, I think we can all agree  
16 that there are areas of this contract -- Mr. Friedmann  
17 agrees that -- and as Your Honor has mentioned, that could  
18 be -- could have been better written. The question is  
19 whether there's ambiguity here. So --

20 THE COURT: Well, but there's no limitation on  
21 your right to inventory, except as described by type in this  
22 category. Then there's another type.

23 MR. LIMAN: Your Honor, what I'd also like to  
24 address -- I don't think that that's the correct read, but I  
25 would like to move on to the other --

1 THE COURT: Okay, but is it -- but why isn't it?

2 MR. LIMAN: Because I think that what the contract  
3 ties the ordered inventory to is to the schedule which  
4 refers to, approximately, 166 million. That's been the view  
5 of the Debtors throughout --

6 THE COURT: But it doesn't -- but it doesn't limit  
7 it to that. I mean, if -- do we know how much inventory  
8 there is?

9 MR. LIMAN: Well, Your Honor, if you were to  
10 assume a contract, then pursuant to the assumption  
11 provisions we might get some additional inventory. In terms  
12 of how much inventory there is, I don't know the answer to  
13 that.

14 THE COURT: I mean, this is why I wonder whether  
15 it didn't tie into the E&Y analysis. I don't know. But it  
16 --

17 MR. LIMAN: I don't -- I don't know the amounts of  
18 ordered inventory at closing. Let me address, though, the  
19 sense of this provision from Transform's perspective.  
20 Because from Transform's perspective, the contract was  
21 clearly structured --

22 THE COURT: I'm sorry. Does anyone know whether  
23 the inventory value that has been transferred to Transform  
24 is greater or less than 200 and -- the number on the  
25 Schedule F? 266-something?

1 MR. LIMON: 166? The amount of ordered inventory  
2 for close?

3 THE COURT: I'm sorry. Whatever is on the  
4 schedule. 166,557,621?

5 MR. SCHROCK: Your Honor, Ray Schrock. I'm sure  
6 we know -- because, frankly, on this provision --

7 THE COURT: Did anyone pay attention to that? I  
8 mean, is that -- I mean, I think what Mr. Liman is saying is  
9 that they're not entitled to anything above that number.  
10 The Debtors are. Did anyone ever actually do that  
11 calculation?

12 MR. LIMAN: Your Honor, I think we can provide --  
13 I think -- I'm told it's around 150 million or so of ordered  
14 inventory. 1-5-0. I mean, from their perspective,  
15 obviously, there's going to be an interest in not ordering a  
16 lot of inventory because if the transaction falls through,  
17 then they're stuck with that. Right? As Your Honor  
18 recalls, there was -- it was a very real question whether  
19 this transaction was going to close. And if the transaction  
20 did not close, they would have been stuck with that  
21 inventory. So, just as a commercial matter, parties trying  
22 to control the risk, they're not going to be ordering a lot  
23 of inventory. And I think they were not ordering a lot of  
24 inventory.

25 I would like to get to both the sense of the

1 provision from our perspective and then the seven different  
2 reasons why we believe the contract is ambiguous. From --  
3 and maybe what I will do, because it's late in the day, and  
4 to conserve time, is I'll talk about the sense of the  
5 provision from our perspective when I talk about the  
6 different contractual provisions. Because I do think that's  
7 the first place Your Honor needs to look.

8 And the first place that I would look is not in  
9 2.3K at all. I would look in 2.4Q. Under the excluded  
10 liabilities section, Justice Kagan wrote. It would've been  
11 of a different context about the obligation to read  
12 difficult documents, and this is a -- not an easy document,  
13 in my experience.

14 Critical bits -- actually, every sentence of 2.4Q  
15 is critical but what I'd like to do is direct your attention  
16 first to the bottom two sentences of 2.4Q. Remember, this  
17 is the excluded liabilities, and the excluded liability with  
18 the exception that I'll get to in a moment, is accounts  
19 payable incurred in the ordinary course of business existing  
20 on the closing date.

21 That's important because that reflects the party's  
22 intention that as a general matter, accounts payable in the  
23 ordinary course would be an excluded liability.

24 THE COURT: I'm sorry. What?

25 MR. LIMAN: It's 2.4Q.



1 THE COURT: Q?

2 MR. LIMAN: Q. Let me wait a second. 2.4 starts  
3 on Page 42. And it talks about "None of the buyer, any  
4 affiliate of the buyer or any assignee shall assume, be  
5 deemed to assume, or be obligated to assume any of the  
6 following." And then it lists a number of excluded  
7 liabilities.

8 And then if you read all the way down to Q, you  
9 get to "Accounts payable incurred in the ordinary course of  
10 business existing on the closing date." I'm going to get to  
11 the exceptions in a moment, but I do want to pause on that  
12 language. Because what that language reflects is that as a  
13 general matter, accounts payable in the ordinary course  
14 would be on the Debtors' accounts and would not be assumed  
15 by us.

16 Now, there is an exception to that. The clause  
17 starts off with the words "other than". And in common  
18 English language, I would hazard to tell Your Honor that the  
19 "other than" connotes a subset of what is the excluded  
20 liability. And it refers to there the subset of 2.3G and a  
21 subset 2.3K that includes severance reimbursement  
22 obligations, assumed 503B9 liabilities, and other payables  
23 and payment obligations with respect to the ordered  
24 inventory.

25 There are two separate points I want to make with

1 respect to this clause and two separate reasons why we think  
2 this favors us, and at a minimum, creates ambiguity. The  
3 first reason is that -- has to do with what the Debtors'  
4 interpretation is of other payables. Their interpretation  
5 has to be that other payables mean accounts payable incurred  
6 in the ordinary course. How do you know that? You know  
7 that through 2.3K. If you go back to 2.3K, and 2.3K says  
8 that we're not required to make any payments with respect to  
9 other payables until the later of the closing date or the  
10 date the obligation -- obligations thereunder become due in  
11 the ordinary course. And that's what they've stuck us with.  
12 That's been their position, that we're stuck with other  
13 payables in the ordinary course of business.

14 You would have to read this clause to say  
15 something like -- other than the -- you'd have to read it to  
16 say that buyers are obligated to assume accounts payable  
17 only up to 166 million, or other payables up to 166 million.  
18 But, Your Honor, if you want to read the contract as a...  
19 Let me pause there for a second. Because that is the only  
20 limitation --

21 THE COURT: Can I interrupt you?

22 MR. LIMAN: Yes.

23 THE COURT: The Debtor argues I think with some  
24 cogency that 166 million of other payables are assumed by  
25 the buyer. And so they're not included in the general

1 provision of invoiced accounts payable in the ordinary  
2 course. That's why there's a dollar limitation on other  
3 payables. They are -- they are, in fact, ordinary course  
4 payables but there's a cap.

5 MR. LIMAN: Yeah, that's their interpretation.

6 THE COURT: Well, why doesn't that make perfect  
7 sense?

8 MR. LIMAN: And if that was what the parties were  
9 trying to do with respect to accounts payable, they would  
10 have done exactly what they did with respect to the assumed  
11 real estate taxes, tax liability. What they did with  
12 respect to the assumed real estate tax liability is they  
13 said we're only assuming the real estate tax liability up to  
14 135 million. It was not listed as an excluded liability. I  
15 grant you that that's the Debtors' interpretation, but what  
16 I'm saying is that the Debtors' interpretation --

17 THE COURT: But -- but 2.3K, that's what it  
18 actually does. And then has the -- 5 says, "Buyer's  
19 obligations with respect to the payables shall not exceed  
20 166 million."

21 MR. LIMAN: Your Honor, if you were -- if this  
22 contract was just 2.4Q, because I think you do -- I mean,  
23 our argument is that these are excluded liabilities under  
24 2.4Q. They argue they're included under 2.3K. We argue  
25 that they are excluded under the plain language of 2.4Q.

1 And what the 2.4Q says is that they are -- and what it  
2 defines... So, the point number one is to give meaning to  
3 both of these provisions. To give meaning to both of these  
4 provisions and avoid them from being surplusage. The only  
5 way to read them is to say that the other payables are  
6 modified by ordered inventory.

7 And I'm not making that up, Your Honor. That's  
8 not coming from Lewis Liman, that's coming from the Debtors.  
9 That's coming from the Debtors when they say in their papers  
10 -- we ask the question, what does 2.4Q do? And they say,  
11 2.4Q is there for avoidance of doubt. That's their  
12 argument. The second point, Your Honor --

13 THE COURT: Well, it avoids the doubt that there's  
14 any obligation in respect of accounts payable in excess of  
15 166 million, that the buyer's liable for.

16 MR. LIMAN: It absolutely does that but it does  
17 something more, and it has to do something more under the  
18 rules of contract interpretation that we're bound by,  
19 they're bound by, frankly, Your Honor is bound by -- which  
20 is to give meaning to every word. And to avoid  
21 interpretations that are for avoidance of doubt,  
22 particularly --

23 THE COURT: Well, let's just do this. So, 2.3K is  
24 the provision that says what are assumed liabilities, right?

25 MR. LIMAN: Correct.

1 THE COURT: All right, so those are the  
2 liabilities that the buyer is assuming. That's one  
3 function. 2.3K, buyer assumes these liabilities. It  
4 doesn't say buyer doesn't assume any other liability. It  
5 doesn't say these are -- everything else is excluded.  
6 That's in 2.4. So, they each serve their own function. One  
7 is assume, one is exclude.

8 MR. LIMAN: But, Your Honor, what I'm trying to do  
9 is --

10 THE COURT: I think we're going to move off of  
11 this point. It's not working. I mean, you may be able to  
12 convince someone else of it, but I doubt it. You're not  
13 convincing me on this one. We should move on.

14 MR. LIMAN: Let me move on to the other points.  
15 But I think what we're trying to do is answer the question  
16 whether other payables in all payment obligations is a  
17 single thing --

18 THE COURT: I agree. And I think the last ten  
19 minutes helped convince me that they're not.

20 MR. LIMAN: Well, the one thing I would say with  
21 respect to 2.4Q is that they put meaning on the use of the -  
22 - the absence of the word "and" in 2.3K. That word "and" is  
23 in 2.4Q. Let me move on.

24 THE COURT: And?

25 MR. LIMAN: And. When you use "and" it usually

1 separates out two different things. Page 44.

2 THE COURT: Okay. And so it does separate out  
3 other payables and payment obligations with respect to the  
4 ordered inventory in 2.4Q. And in -- so, where...

5 MR. LIMAN: 2.3K, that word "and" is not there.  
6 Now, when we were last in front of Your Honor on this --

7 THE COURT: But -- I'm sorry, 2.3K. "Other  
8 payables and all payment obligations with respect to  
9 (indiscernible) inventories." It is there.

10 MR. LIMAN: The point that I'm trying to make,  
11 Your Honor --

12 THE COURT: You mean the "and" in front of "other  
13 payables", is that what's missing? In front of "other  
14 payables"?

15 MR. LIMAN: That's what their argument was the  
16 last time around. And that the absence of the "and"  
17 connotes that it is -- that the presence of the "and"  
18 between "other payables" and "payment obligations" is  
19 meaningful.

20 THE COURT: Well... It doesn't really change the  
21 meaning in either sense, to me.

22 MR. LIMAN: Let me go through the other reasons,  
23 Your Honor, why we think that there's ambiguity with respect  
24 to this contract. Your Honor, the context of this is that  
25 in terms of the reasonable expectations of the parties, the

1 language that Your Honor is interpreting was understood by  
2 both parties. This is undisputed to mean that payables were  
3 only with respect to ordered inventory. That's --

4 THE COURT: Only with respect to what?

5 MR. LIMAN: Only with respect to ordered  
6 inventory. That's from their board minutes and that's from  
7 a January 9th --

8 THE COURT: But this is their (indiscernible)  
9 evidence we're talking about now? Okay.

10 MR. LIMAN: Correct. The question is whether --  
11 whether you can -- you can blind your eyes to that. I want  
12 to turn your attention now to 2.4(k)(vi). I'm sorry,  
13 2.3(k)(vi). 2.3(k)(vi) refers to the liabilities described  
14 in this Clause K. And I think we've already established, I  
15 hope, that a payment obligation with respect to ordered  
16 inventory is a Liability, capital L, under the APA. I don't  
17 think anybody should dispute that.

18 THE COURT: I'm sorry. Is a liability?

19 MR. LIMAN: Is a liability. I don't think anybody  
20 should dispute that. I think that's just a fact. Now, in  
21 order to read 2.3(k)(vi) the way that the Debtors would have  
22 you read it, it would have to say something like buyer's  
23 obligations to assume some of the liabilities, or certain of  
24 the liabilities, or the liabilities described below. But it  
25 doesn't do that. Mr. Friedmann makes fun of me for using --

1 talking about the definitive article, but, you know, Your  
2 Honor, I'm just a lawyer. I use the rules that the courts  
3 tell me to use. And one of the rules the courts tell me to  
4 use is when a word "the liabilities described in this Clause  
5 K" is used -- it's intended to encompass all of the  
6 liabilities described in this Clause K.

7 And that's important because -- because the  
8 liabilities that are then described as the ones that -- that  
9 are reduced refer to severance reimbursement obligations  
10 assumed 503(b)(9) claims and in other payables. Meaning,  
11 Your Honor, that other payables has to be something that  
12 encompassed that whole clause. It is a single thing.  
13 There's no other way to give meaning to the parties using  
14 the word "the liabilities described in this Clause K."

15 THE COURT: What whole...? What whole clause?  
16 I'm sorry. I didn't -- what whole clause?

17 MR. LIMAN: The whole clause, "other payables and  
18 all payment obligations." The question that we're addressing  
19 is whether other payables and all payment obligations is a  
20 single unit or two separate units. If you read them as a  
21 single unit, you can make sense of the language of  
22 2.3(k)(vi). If you don't read them as a single unit, it's  
23 difficult to make sense of that language.

24 THE COURT: Why?

25 MR. LIMAN: Because then it would not read "the



1 liabilities described in this Clause K." It would say the  
2 liabilities below, it would say certain of the liabilities,  
3 but it would not use a definitive article "the liabilities  
4 described in this Clause K." That's what the laws of the,  
5 you know, contract tell us.

6 THE COURT: I still don't get it. I mean, there's  
7 a specific waterfall that you follow as far as what you're  
8 crediting against, as far as the assumption of liabilities.

9 MR. LIMAN: But one of the things that's not in  
10 that waterfall is payment obligations with respected to  
11 ordered inventory. That's the point.

12 THE COURT: Right. Again, to me, that proves the  
13 Debtors' case, not your case. Because, again, the other  
14 payables is capped, it's a capped number. So that's the  
15 thing you cut back on first.

16 MR. LIMAN: But --

17 THE COURT: I mean, not for a second. Actually,  
18 the first thing you'd cut back on is the assumed 503B9  
19 claims, which is another capped number.

20 MR. LIMAN: But this doesn't have payment  
21 obligations with respect to the ordered inventory capped --

22 THE COURT: I know.

23 MR. LIMAN: And that's --

24 THE COURT: So, I mean, the parties know the  
25 difference.

1 MR. LIMAN: But no, Your Honor, that is one  
2 inference you can draw.

3 THE COURT: Right.

4 MR. LIMAN: That is undoubtedly one inference you  
5 can draw. The question for Your Honor is whether the  
6 opposite inference, which is that when the word "the  
7 liabilities" described in Clause K is used, and then it's  
8 followed by a series of liabilities, those liabilities that  
9 it's followed by are intending to encompass the entirety of  
10 the liabilities described in Clause K.

11 Debtors' argument is, no, it only encompasses  
12 certain of the liabilities described in Clause K. Our  
13 argument, based on plain English, is that it has to, as a  
14 matter of plain English --

15 THE COURT: I'm sorry. Let me -- let me just see  
16 where you and I disagree with this. There's a certain set  
17 of obligations that the buyer has under Clause K, or certain  
18 obligations under Clause K that the buyer has agreed to  
19 assume, right? So far we're on the same page.

20 MR. LIMAN: That's correct. Correct.

21 THE COURT: All right. So, if the DIP -- if the  
22 aggregate DIP shortfall is a positive number, then that  
23 group of liabilities that the buyer has agreed to assume in  
24 all of Clause K shall be reduced dollar for dollar by the  
25 aggregate DIP shortfall in the following order.

1 First, the severance reimbursement obligations,  
2 which is a capped number, right?

3 MR. LIMAN: That's correct.

4 THE COURT: I think it's -- what is it, 45  
5 million? I think. Something like that.

6 MR. LIMAN: It is --

7 THE COURT: Anyway, it's a capped number.

8 MR. LIMAN: It's a capped number, Your Honor. It  
9 was 43 million.

10 THE COURT: All right, 43 million. Second, the  
11 other payables, which is a capped number, 166 million.  
12 Then, third, the assumed 503B9 claims, another capped  
13 number. Now, are you saying that because it doesn't then  
14 say and then fourth, the ordered inventory, that that means  
15 that the whole phrase should be read together? Is that what  
16 you're saying? The --

17 MR. LIMAN: No.

18 THE COURT: -- other payables and ordered  
19 inventory?

20 MR. LIMAN: No, what I'm saying is twofold. First  
21 of all, I don't, frankly, understand the significance of the  
22 cap with respect to the three items. The second thing that  
23 I'm saying is that in order to give meaning to the language  
24 of the liabilities described, the better interpretation  
25 would be that one picks up all of the liabilities described

1 in Clause K. That's what the rules of grammar would say.  
2 And that the inference that you should draw from the fact --  
3 this is where we are not on the same page -- the inference  
4 that you should draw from the fact that it does not list  
5 payment obligations with respect to the ordered inventory.  
6 We said we were not picking up the payment -- that the  
7 payment obligations with respect to the ordered inventory  
8 and the payables with respect to the ordered inventory were  
9 the same thing. What the parties were trying to do was to  
10 cap the liability with respect to the ordered inventory and  
11 trying to make it clear that whatever form those obligations  
12 took -- whether they took the form of something that at the  
13 time of closing is payable or payment obligation, we would  
14 take it on. Frankly, Your Honor, that makes sense to --

15 THE COURT: Wouldn't it be a lot -- wouldn't it  
16 have been a lot easier just to have said either in the  
17 definition or in 5, the other payables and the payment  
18 obligations with respect to the ordered inventory in the  
19 aggregate, than going through all of this?

20 MR. LIMAN: Absolutely.

21 THE COURT: I mean --

22 MR. LIMAN: There's no question that this  
23 provision is not well written.

24 THE COURT: Well, but it seems perfectly logical  
25 to me, given the economic deal, that the buyer gets the

1 ordered inventory, that there's no crediting there. There's  
2 no crediting because it's the buyers. And that's why there  
3 shouldn't be any crediting mechanism for that.

4 MR. LIMAN: And in fairness, Your Honor, that's  
5 not an inference you can draw without hearing --

6 THE COURT: Well, no, but --

7 MR. LIMAN: Listen to me for a second, Your Honor.

8 THE COURT: Okay.

9 MR. LIMAN: If I might. You can't throw that  
10 inference without hearing the testimony of the witnesses who  
11 --

12 THE COURT: But that's the context. It's just a  
13 logical thing.

14 MR. LIMAN: No, it is not. It is not the context.  
15 It's not the deal that the parties struck. It's not the  
16 transaction that the parties struck. The testimony is  
17 unambiguous with respect to this. It was not the economic  
18 deal that they struck. There is no reason to assume an  
19 additional 166 million for payables. This was a deal that  
20 was carefully balanced where every obligation that we took  
21 on was matched with an asset on the other side.

22 They would have this read -- that is absolutely  
23 correct, Your Honor. Every obligation we took on was  
24 matched with an asset on the other side. And they would  
25 have this clause read -- they would have us take on 166

1 million of accounts payable without any countervailing value  
2 contrary to what we -- what 2.4Q limited for us -- without  
3 any other value. And in amounts -- the amount here is huge.

4 You know, if you talk about severance, severance  
5 was 43 million. The amount of 503B9 was 139 million. Real  
6 estate was 135 million. We got value for all of those  
7 items. What they would have you believe is that all of a  
8 sudden in between January 9th and January 17th, somehow we  
9 agreed to just give them \$166 million. That was not the  
10 case. It blew all of our financing models. We had to  
11 finance at the last minute to make this deal work.

12 Now, you know, Your Honor might conclude that  
13 that's all --

14 THE COURT: What was the aggregate of their  
15 shortfall?

16 MR. LIMAN: The -- well, that's a matter that we  
17 are now arguing over in terms of the amount of available  
18 cash. In our view it was, I think, \$8.5 million in terms of  
19 the aggregate.

20 THE COURT: This provision really is about  
21 peanuts.

22 MR. LIMAN: I'm not referring to the provision of  
23 what it's about. I'm referring to it in terms of the way in  
24 which you can hear the evidence that says that what's  
25 happening here is they're trying to re-trade the deal and

1 stick us with something that we never agreed to, and that  
2 resulted in our financing having to be blown up.

3 I'd like to turn now to 2.3K itself and 2.3 as a  
4 whole. If you look through 2.3 as a whole, which you did  
5 not look through the last time because it wasn't brought to  
6 your attention. If you remember, this came up as one item  
7 among many, many other items during the sale hearing.

8 If you look through that provision, each and every  
9 clause refers to a separate liability. 2.3... It's ripped  
10 out a page of my (indiscernible)...so, I'm sorry. But if  
11 you look at 2.3A, it's all liabilities arising out of the  
12 ownership of the acquired assets. If you look to 2.3B,  
13 that's, again, a single liability. 2.3C, 2.3D, 2.3F, G,  
14 etc. You get down to 2.3K and the first thing that should  
15 strike you is that 2.3K is different from all of other  
16 clauses that both preceded and followed. The way in which  
17 it is different is that it groups everything together. And  
18 it groups everything together because it's -- all of those  
19 things are subject to a proviso.

20 The only reason for liabilities to be included in  
21 that 2.3K is if they're modified by that proviso. If not,  
22 there's no reason for them to be in 2.3K at all. And  
23 because, otherwise, Your Honor, it would be an easy thing.  
24 If they were trying to get what they wanted, they would put  
25 2.3 -- put it at the very end, 2.3P, all payment obligations

1 with respect to the ordered inventory. Not modified by any  
2 proviso.

3 They put it in that clause. They put it in that  
4 clause for a reason. The reason is that each of those items  
5 was modified by at least one of those provisos. The parol  
6 evidence, if you were to look at it, would show you that as  
7 originally drafted, K1 actually referred to the liabilities,  
8 meaning, the liabilities that were included other payables  
9 and all payment obligations. It was redrafted. All of the  
10 provisions are in these -- severance reimbursement  
11 obligations, assumed 503B9 liabilities, and then our  
12 interpretation, not their interpretation -- our  
13 interpretation "other payables and payment obligations with  
14 respect to the ordered inventory." They don't like it  
15 because what that would mean is that with respect to each of  
16 these items where other payables is referred to, it would  
17 limit our liability to, in (v), 166 million. It would give  
18 us a right to reduction under the waterfall. But that was  
19 the only reason for the inclusion of that provision in 2.3K.  
20 You can't explain why it would be in there unless it is all  
21 with respect to a single liability.

22 There are a couple more things that I think I'd  
23 like to mention. And I think, Your Honor, what this shows  
24 is that you have to look at the parol evidence, because if  
25 you look at this -- at this clause, most of the provisions



1 would be -- could be -- would be written the way they were  
2 under our interpretation. Some favor us.

3 If you look at 2.3(k)(vii), (viii) and (ix), those  
4 exclude -- they do not list in there other payables. Now,  
5 under their interpretation other payables should function  
6 the same as severance reimbursement and assumed 503(b)(9)  
7 liabilities... That, I think, actually, was the point Your  
8 Honor made. That all of those items were capped. In fact,  
9 they're all lower numbers than the other payables.

10 It does not mention other payables. And that's --  
11 and there's no reason for that other than if other payables  
12 and all payment obligations are modified by ordered  
13 inventory. Or put another way, the reason why other  
14 payables is not in 2.3(k)(vii), (viii) and (ix) is because  
15 there was a self-reinforcing cap with respect to the other  
16 payables. It had to do with the ordered inventory. The  
17 last two points --

18 THE COURT: I'm sorry. You have to explain that  
19 to me. How does that tie in to specified receivables and  
20 warranty receivables shortfall?

21 MR. LIMAN: The way it ties in, Your Honor, is  
22 that the logic of the specified receivables and warranty  
23 receivables is that those provisions, unlike -- the DIP  
24 shortfall provision have a specific function. The DIP  
25 shortfall provision had to do with protecting against the

1 risk that they had more cash than they were representing  
2 that they had. That was the purpose of the DIP shortfall  
3 provision.

4 And that's the reason why, with respect to the DIP  
5 shortfall provision, there is a reference to the other  
6 payables. Because if they had more money than they said  
7 that they had, then the economics on which the deal was  
8 built was wrong and they would have to recut the deal.  
9 Essentially, they would give us the excess above the amount  
10 to pay down the DIP to the 1.2 billion.

11 The function of the specified receivables, the  
12 warranty receivables shortfall amounts, and the prepaid  
13 shortfall amounts was that those would compensate us if they  
14 delivered less than what they said that they would deliver.  
15 Let's say they delivered zero with respect to prepaid  
16 inventory, if they delivered zero with respect to specified  
17 receivables, under their interpretation, you would max out  
18 the severance reimbursement obligation, you would max out  
19 the 503B9 obligation, and we still would be stuck with 166  
20 million of accounts payable.

21 There's no business logic for that decision. If  
22 the purpose of that shortfall was intended to compensate us  
23 for a shortfall through the liabilities that we were  
24 assuming, there's no reason why you would treat other  
25 payables, accounts payable, different from severance

1 reimbursement obligations or the assumed 503B9 liabilities.

2 Remember, their view was it's just a block of 166  
3 million. There's no logic for having that...

4 THE COURT: Well, it's part of -- the logic is  
5 it's part of the purchase price.

6 MR. LIMAN: Well, right, but you have to -- that  
7 would be their logic if we just gave them 166 million  
8 excess. But why -- but why would we -- why would the  
9 parties distinguish accounts payable from assumed 503B9 live  
10 bonus? What's the logic of that? That's not something that  
11 they've ever answered.

12 THE COURT: Because those are smaller numbers, I  
13 guess. But could I -- does ordered inventory appear  
14 anywhere else in the agreement?

15 MR. LIMAN: It does, Your Honor. It appears in  
16 2.1X with respect to what we're buying. (indiscernible)  
17 2.1X refers back to the pending inventory, which then refers  
18 to the ordered inventory.

19 Now, I'm not saying, Your Honor, that this is a  
20 perfectly written contract. This is a contract that people  
21 wrote, you know, over several days without sleep and there  
22 are things that could have been better drafted. But there's  
23 just no evidence whatsoever that all of a sudden they  
24 decided to stick us with and we agreed to take the  
25 additional 166 million, which would blow these assumed 503B9

1 liabilities and severance reimbursement liabilities, real  
2 estate liability out the water.

3 Now, I do want to mention -- respond to a couple  
4 of their points because they said something like there is no  
5 payables for ordered inventory. And if Your Honor is going  
6 to receive that evidence, I think Your Honor has to receive  
7 the evidence that they told us precisely the contrary and  
8 that they told Your Honor precisely the contrary.

9 And the last argument -- they make this argument  
10 about there being two schedules. And I think, frankly,  
11 that's a little bit of a red herring. There is a redundancy  
12 but it's not the redundancy or the problem that's created by  
13 the schedule for ordered inventory and the schedule for  
14 other payable. It's a redundancy that's created by there  
15 being a schedule for other payables, which says 166 million.  
16 And then 2.3K, which says that other payables is capped at  
17 166 million.

18 You know, sitting here today, I don't know that --  
19 I can tell you the history of how those schedules were  
20 added. I can't give you a logic to why there was a schedule  
21 for other payables when there was a cap of 166 million in  
22 the contract. Parties exchange schedules sometimes when  
23 they don't need to. It's not a very satisfactory answer but  
24 it's not an answer that has any bearing on the question  
25 before Your Honor.

1 THE COURT: So you're saying they're not the same  
2 thing?

3 MR. LIMAN: I'm saying that -- I'm saying that the  
4 two schedules relate to each other. They obviously relate  
5 to each other. The reason why the other payables was capped  
6 at 166 million was because their estimate as of January 9 --  
7 there's an interesting tidbit with respect to January 9.  
8 Their estimated January 9 was that their ordered inventory  
9 would be 166 million. The interesting little tidbit is that  
10 that schedule, unlike the specified receivables schedule has  
11 an "as of" date. The "as of" date is January -- is January  
12 9. So, there's not a representation that we would be  
13 getting necessarily the full 166 million -- it would be  
14 about 166 million. And there's no coincidence that those  
15 two numbers bear a relationship with each other if the 166  
16 million doesn't find any home other than to be in  
17 relationship to the inventory that they were asking us to  
18 take on -- what they said that they would be able to deliver  
19 after the close.

20 THE COURT: But what's the home for the other  
21 payable schedule then?

22 MR. LIMAN: What's the home for the other payable  
23 schedule? Your Honor, under either interpretation, under  
24 their interpretation, under our interpretation, there is no  
25 home for it. Under their interpretation --

1 THE COURT: Well, it's in the agreement. It must  
2 mean something, right? And that's the term used in the  
3 carve out.

4 MR. LIMAN: Well, it's used in -- there really is  
5 -- it doesn't -- I don't think anything contracts  
6 (indiscernible) let me tell you the reason why. The reason  
7 why is that 2.3K5 says the buyer's obligation with respect  
8 to other payables shall not exceed 166 million in --

9 THE COURT: Right. That's not a tie-in to the  
10 schedule. I understand that. It's just a fixed number.

11 MR. LIMAN: It's a fixed number.

12 THE COURT: Right. Right.

13 MR. LIMAN: And the other payables is in --

14 THE COURT: But then why would have the schedule  
15 in the first place?

16 MR. LIMAN: I don't know when you have the  
17 schedule with respect to the other payables. The question  
18 you might ask is why do you have a schedule with respect to  
19 the ordered inventory? Because, you know, if your other  
20 payables is going to be capped at 166 and that's going to be  
21 limited with respect to ordered inventory --

22 THE COURT: Maybe it ties into the ordinary  
23 course? I don't know. We haven't gotten to that point yet.

24 MR. LIMAN: Yeah, I think -- I think that's what  
25 it is. I think it is what ties into the ordinary course and

1 the parties' expectation with respect to what we're taking  
2 on. Now, there's no doubt that the deal that was struck by  
3 the parties here is that we were taking on the liability for  
4 accounts payable and we were getting something in return.

5 The evidence that we've proffered establishes  
6 that, I think, beyond peradventure. You would be required,  
7 Your Honor, to ignore that if you find that the language is  
8 clear and unambiguous. We don't disagree with that. What  
9 we do disagree with is that given the number of different  
10 provisions here that are in tension with the buyer's  
11 interpretation -- that Your Honor should hear that evidence.  
12 It may be that after Your Honor hears that evidence, Your  
13 Honor comes to the conclusion that the economic deal is what  
14 they say it was. I don't think that this is an instance  
15 where, frankly, Your Honor fairly can decide this issue,  
16 where you should decide this issue, without giving my client  
17 an opportunity to be heard with respect to the deal that  
18 they say they struck. They can reject it, they can be  
19 cross-examined. I really think -- I really, really think  
20 you should hear it. We have the witnesses ready.

21 MR. SCHROCK: Your Honor, Ray Schrock for the  
22 Debtors. Just really quick. You know, we -- we didn't put  
23 in parol evidence. And I've heard a lot of parol evidence  
24 in on the course of counsel's argument. This particular  
25 point, it was a deal point in the course of the

1 negotiations. I know Mr. Liman wasn't there. I happened to  
2 be there.

3 THE COURT: No, I don't want to hear any of this.

4 MR. SCHROCK: Okay. I will -- Your Honor, with  
5 all due respect, I just have to tell the Court that this --  
6 assuming these liabilities, this was one thing that we were  
7 very focused on, being very clear in the agreement. I think  
8 Mr. Liman has already admitted that, listen, the schedule  
9 doesn't even have a home. You write it right out of the  
10 agreement, if you accept their interpretation of the  
11 agreement. Other payables means 166. It's part of the  
12 purchase price. We think there is no parol evidence that's  
13 necessary.

14 THE COURT: I really -- I think we're going over  
15 all ground.

16 MR. SCHROCK: Okay.

17 THE COURT: I'm going to rule on this discrete  
18 issue now. I appreciate that there are setoff issues as  
19 well as ordinary course issues that haven't yet been  
20 addressed, but I think this is a discrete issue. The  
21 parties agree, as they must because it's consistent with the  
22 law governing this agreement, which is obviously between  
23 sophisticated parties, that if the agreement is clear on its  
24 face and unambiguous and that doesn't include ambiguity  
25 simply asserted by the parties but objectively clear on its



1 face, then I should not delve into any extraneous or parol  
2 evidence.

3 I think that's especially important in the context  
4 of this particular transaction, which is, after all, a  
5 bankruptcy sale noticed to thousands of parties and subject  
6 to review by thousands of parties who have the right to  
7 object. And which, in fact, did receive objections from  
8 various parties based on their review of the agreement in  
9 its plain terms.

10 In addition, the agreement followed an extensive  
11 process of negotiations, drafts, redrafts, rejections,  
12 modifications, and ultimate acceptance. And that accepted  
13 version was the one that was put before the Court on notice  
14 to all the parties in interest. So, it seems to me that the  
15 agreement's plain terms need to be followed, as I've been  
16 following them throughout the day with regard to all of  
17 these issues, even if one could make at least a callable  
18 argument that what the parties really intended was something  
19 that the agreement doesn't actually say.

20 Here the issue pertains to whether, under Section  
21 2.3K of the asset purchase agreement, the buyer Transform  
22 assumed not only liabilities for Other Payables, a defined  
23 term, capitalized term, Other Payables, but also all payment  
24 obligations with respect to Ordered Inventory, another  
25 defined term or a separate defined term.

1           It appears clear to me from the relevant language  
2       of the agreement, first and foremost, Section K, which  
3       includes not only the introduction to Section K but also  
4       Sections K1 through O or, I'm sorry, 1 through X or ten,  
5       little Roman x, but also Section 2.4A and 2.4Q. And, of  
6       course, the definitions themselves of the two terms, which  
7       the Debtors state really are two separate terms, two  
8       separate concepts -- and Transform says are really one  
9       concept. And those definitions are found in Section 1.1 at  
10      Page 24.

11           This is relevant for two reasons. One is that  
12      Section 2.3K Roman V caps buyer's obligations with respect  
13      to Other Payables, without saying anything about Ordered  
14      Inventory, at 166 million. And then the crediting section  
15      that follows it, 2.3K6, also provides for credit in the  
16      event of an aggregate DIP shortfall as against the  
17      obligation of assumed other payables, but does not refer to  
18      payment obligations with respect to ordered inventory that,  
19      according to the Debtors, are assumed under the agreement.

20           I conclude that the parties intended, by the  
21      language that they agreed to, that these terms were two  
22      separate and distinct terms, that each was assumed, i.e.,  
23      Other Payables was assumed in the amount capped at 166  
24      million, and Ordered Inventory payment obligations was  
25      assumed in an uncapped amount. There's no other reason to

1 have the two definitions used in these provisions the way  
2 they are actually used, which I believe is carefully. And  
3 that's the clear and obvious reading.

4 The buyer argues that 2.4Q would really be  
5 surplusage under those circumstances. As I said during oral  
6 argument, it appears to me to be exactly to the contrary.  
7 That, in fact, the carve out from 2.4Q for liabilities  
8 assumed with respect to Other Payables and the payment  
9 obligations with respect to Ordered Inventory is there for a  
10 reason. And the reference then to Other Accounts Payable  
11 being not assumed liabilities, clearly refers to accounts  
12 payable in excess of \$166 million, which clearly means that  
13 that section is not surplusage since that's the only section  
14 that specifies that that is not -- that that is an excluded  
15 liability. Whereas 2.3K refers to an assumed liability and  
16 doesn't say about any other liability being excluded.

17 I will also note that 2.4A provides that "Excluded  
18 liabilities shall include all liabilities of the seller  
19 other than other payables, comma, the assumed 503B9 claims,  
20 comma, severance reimbursement obligations, comma, and  
21 ordered inventory" -- again, separating the terms clearly  
22 and unambiguously as separate -- separate obligations that  
23 are being assumed by the buyer.

24 I don't believe there's any other logical  
25 interpretation of the agreement just based on the wording of

1 the agreement. It would be remarkably easy to draft the  
2 language as Transform would have it be interpreted, and I  
3 believe it's perfectly appropriate to assume that if this  
4 point was as important to the buyer as it has contended, it  
5 would have insisted on such drafting. Mainly, either using  
6 one defined term -- and that's especially the case since  
7 Ordered Inventory is used separately in the agreement  
8 apparently only once and not in a meaningful way that would  
9 require it to be separately defined for purposes of this  
10 provision in 2.1x.

11 But, more importantly, it would be absolutely a  
12 cinch to draft this phrase in one way or another to say that  
13 "Other Payables and all payment obligations with respect to  
14 Ordered Inventory in the aggregate not to exceed 166  
15 million," with respect to both terms together. Because  
16 that's not done and because the terms are used separately,  
17 where accounts and logically one or the other is used  
18 without derogating from that logic, it's clear to me that  
19 the parties' agreement provides what it say -- that the  
20 buyer assumes liability for Ordered Inventory payment  
21 obligations, all of them, and Other Payables separately, not  
22 to exceed \$166 million.

23 Again, 2.1K could have been remarkably easily  
24 drafted to say, "Buyer's obligations with respect to Other  
25 Payables and Ordered Inventory in the aggregate shall not

1 exceed 166 million." The parties certainly know how to say  
2 in the aggregate since they put it at the end of that  
3 clause, but they don't add the term "All payment obligations  
4 with respect to the Ordered Inventory."

5 I think these rulings to the extent that the  
6 canons of interpretation are particularly meaningful comply  
7 or are consistent with the last antecedent rule both in  
8 respect of 2.3K's introductory clause as well as 2.3A. But  
9 again, canons of interpretation are like, as the professor  
10 said, picking out your friends at a cocktail party to talk  
11 to. The main point is the plain language of the contract.  
12 And I just can't ignore the separate definitions, the  
13 separate use of the terms, and the fact that that's the  
14 obvious reading. So, I will grant the Debtors' motion on  
15 that -- on that aspect of the disputed issues.

16 That leaves the calculation of the aggregate DIP  
17 shortfall, which hinges on available cash, and that aspect  
18 of the definition as well as the ordinary course reference.

19 MR. LIMAN: Your Honor, with respect to the  
20 ordinary course, and given the lateness of the hour, maybe  
21 we can take that off Your Honor's plate. We have a footnote  
22 in our brief that indicates that work is still ongoing.  
23 We've had discussions with the Debtors about it. And my  
24 suggestion is that we treat that the same as we're treating  
25 the reconciliation and --

1 THE COURT: Okay. But is it fair to say that, you  
2 know, basically non-payment over a week isn't that in the  
3 ordinary course? You have to do something on top of that to  
4 make it out of the ordinary course?

5 MR. LIMAN: I think it's fair to say that -- yeah,  
6 it has to be something on top of that, something different  
7 from that.

8 THE COURT: All right. And again, there's the  
9 communication part. So basically, what you're looking at  
10 now is whether there's something the Debtors did secretly or  
11 not in consultation with Transform, and outside of the  
12 general six-day, one-week issue?

13 MR. LIMAN: And I think we have the parameters of  
14 that, and we can have conversations and --

15 THE COURT: All right.

16 MR. LIMAN: -- hopefully, avoid the need --

17 THE COURT: Well, look, I --

18 MR. LIMAN: -- to bring it to Your Honor.

19 THE COURT: It is 6:20. I don't have any more  
20 facts than just that, what we just agreed upon. So, I'm not  
21 sure there's anything more for me to agree to here. I don't  
22 know when you're going to conclude. I don't even know if  
23 the Debtors thought you were doing more analysis on that  
24 point.

25 MR. FRIEDMANN: I don't think it's appropriate,

1 Your Honor. We closed discovery back on June 21st on these  
2 issues. We got all the expert reports afterwards. We've  
3 already been a little behind the ball on stuff, and at this  
4 point --

5 THE COURT: It seems to me that this isn't a  
6 discovery issue. This is an issue that if Transform finds  
7 out something -- and look, all of the Debtors' employees are  
8 working with Transform basically now --

9 MR. FRIEDMANN: Right.

10 THE COURT: -- and then it'll come up before we  
11 finish with this. But it doesn't seem to me at this point  
12 to be a basis for a setoff. There's no facts that you say  
13 are a basis for a setoff on this point.

14 MR. FRIEDMANN: I think that that's right --

15 THE COURT: All right

16 MR. FRIEDMANN: -- and I think that this would be  
17 (indiscernible) --

18 THE COURT: So, this would be a -- so, you'd make  
19 a payment, and then you'd have a claim.

20 MR. LIMAN: I think that's right.

21 THE COURT: Okay. And that's the relief you are  
22 seeking, so --

23 MR. LIMAN: And, you know, it's -- we've all been  
24 working on a lot of things.

25 THE COURT: Okay.

1 MR. LIMAN: We've been working on it a lot to  
2 satisfy them.

3 THE COURT: All right. So, then we have the  
4 available cash issue.

5 MR. FRIEDMANN: Right.

6 THE COURT: Which is not a defined term in the  
7 agreement, right? I mean, most of the time when I'd see  
8 available cash, it's a defined term.

9 MR. FRIEDMANN: That's correct.

10 THE COURT: Okay. So, it's a lower-case term  
11 that's used in a definition.

12 MR. FRIEDMANN: And Your Honor, where this is  
13 relevant is that the buyer argues that now it's obligated to  
14 assume the \$166 million of other payables, that it should be  
15 reduced by the available cash held by the Debtors at  
16 closing. I believe Mr. Liman said before, they suggested  
17 that was \$8.5 million. I think your reaction to it, it  
18 could be peanuts. It's actually very peanut shells. It's  
19 really -- the DIP shortfall is really \$243,249, because at  
20 closing, the amount of available cash was zero.

21 The testimony of Mr. Riecker, the CFO at the time,  
22 was that every dollar available was used to pay down the  
23 DIP. What ended up happening is when every dollar went to  
24 pay down the DIP, we actually overpaid down the DIP by  
25 \$243,249. That creates an aggregate DIP shortfall as well.



1 And it's a bizarre term, but that is in fact the way the  
2 agreement works.

3 THE COURT: So, that doesn't mean he bounced a  
4 check. That means that --

5 MR. FRIEDMANN: No. We paid more than we had to.

6 THE COURT: All right.

7 MR. FRIEDMANN: What happened was we -- the way it  
8 worked, every night we swept all of our cash to pay off the  
9 DIP. That happened one last time --

10 THE COURT: You paid too much. You overpaid the  
11 DIP?

12 MR. FRIEDMANN: We overpaid by \$243,249.

13 THE COURT: All right.

14 MR. FRIEDMANN: That actually inures to the  
15 benefit to the benefit of Transform. So, there is in fact a  
16 DIP shortfall, but it's approximately \$243,000.

17 THE COURT: I'm sorry, what --

18 MR. FRIEDMANN: The testimony of Mr. Riecker is  
19 also clear that the available --

20 THE COURT: Why is that? I know it's late, but  
21 why is that? If you -- I thought the aggregate DIP  
22 shortfall is the part where the DIP wasn't paid.

23 MR. FRIEDMANN: The idea was that we had available  
24 cash to us, and therefore, they didn't need to take on as  
25 much of the obligation, so much of the liabilities.

1 THE COURT: But did they take it on if it was  
2 already paid?

3 MR. FRIEDMANN: The --

4 THE COURT: If you all paid it, why would they  
5 have taken it on in that amount?

6 MR. FRIEDMANN: What happens is --

7 THE COURT: Or if you prepaid it or overpaid it?

8 MR. FRIEDMANN: By overpaying -- we had to -- the  
9 way that it was set up under -- was it 10.9? -- is we had to  
10 get some very specific targets.

11 THE COURT: Okay.

12 MR. FRIEDMANN: If I remember it was 1.657. Part  
13 of that was we had to hit the DIP exactly. It was a  
14 challenge, I can tell you, to say the least, for my friends  
15 at M-III, where they were trying to get all the receivables  
16 at the right amounts and get the DIP shortfall at the right  
17 amount. And they pulled it off. Kudos to them. 10.10 is  
18 where this comes in.

19 THE COURT: All right. Because the aggregate  
20 shortfall DIP amount definition just says a \$1.2 billion,  
21 less the aggregate amount that's required to be paid, net of  
22 any available cash, to fully satisfy the existing  
23 indebtedness of sellers under both the DIP credit agreement  
24 and the junior DIP. It doesn't refer to 10.10, Section 10,  
25 or anything like that.

1 MR. FRIEDMANN: I'm sorry, are you looking -- is  
2 that the (indiscernible) shortfall --

3 THE COURT: Right.

4 MR. FRIEDMANN: -- which is (indiscernible) not  
5 equal to \$1.2 billion dollars less the aggregate amounts  
6 required to be paid to fully satisfy the existing  
7 indebtedness of sellers under both 1, the DIP credit  
8 agreement, and 2, DIP term loan agreement. I think you have  
9 to cross-reference to 10.10, if I remember correctly.

10 THE COURT: Well, where is that? It's not in the  
11 definition. I don't think it's in 2.3(k)(IX).

12 MR. FRIEDMANN: It refers to the... Sorry, I  
13 don't know these highlights. I have to keep finding them  
14 again. Oh, it's --- in 110, it's got outstanding DIP  
15 indebtedness. They got rid of amount required to be paid to  
16 fully satisfy existing indebtedness of sellers. Under (a),  
17 the DIP credit agreement shall be no greater than \$803,000,  
18 and (b), the junior term loan agreement. Actually, \$850  
19 million -- thank you -- and (b), the DIP term loan agreement  
20 be no greater than \$350 million, exclusive of any accrued  
21 and unpaid interest thereon. So, take it to the \$1.2  
22 million.

23 We were not allowed -- we were penalized for ever  
24 paying that. We were not to pay more than that. And we, in  
25 fact -- not intentionally -- but as it turned out, paid

1 more.

2 THE COURT: I'm sorry, but this says the agreement  
3 shall be no greater than.

4 MR. FRIEDMANN: Right, so we --

5 THE COURT: Required to be -- but you didn't --  
6 this wasn't required. This means that you can't let the DIP  
7 get above \$1.2 billion. I don't see why you don't get the  
8 money back that you overpaid. Anyway, it's not what the  
9 parties agreed. But I'm just laying that out for you. I  
10 don't... I can understand why they don't want the DIP to be  
11 more than \$1.2 billion.

12 MR. FRIEDMANN: Right.

13 THE COURT: But that's what it was. It just so  
14 happened that you paid than \$1.2 billion. But that's not to  
15 anyone's detriment under these documents, other than the  
16 Debtors.

17 MR. FRIEDMANN: Being reminded, I think the idea  
18 was that we were estimating how much money we would need,  
19 and they wanted to ensure we wouldn't overestimate how much  
20 we needed. And this was a way of --

21 THE COURT: Well, did you pay more than \$1.2  
22 billion, or did you pay less than \$1.2 billion? Anyway, I  
23 just -- I would urge the parties to look at those sections--

24 MR. FRIEDMANN: Right.

25 THE COURT: -- and see whether in fact you have

1 run afoul of anything by overpaying.

2 MR. FRIEDMANN: If it turns out that the \$243,000  
3 comes back to us, that would be great for the Debtors and  
4 the estate.

5 THE COURT: But the issue at hand is --

6 MR. FRIEDMANN: The issue at hand is what we had  
7 left after we overpaid it.

8 THE COURT: Right.

9 MR. FRIEDMANN: But the fact that we overpaid it  
10 should clue everybody in on the fact that --

11 THE COURT: You weren't supposed to have any  
12 available cash left.

13 MR. FRIEDMANN: Right. And we didn't. And  
14 available cash, though it's not defined in the agreement, it  
15 is a term that was used at the company, and we went to the  
16 best source for that, which was again, the CFO, Rob Riecker,  
17 who did explain that the company maintained available cash  
18 balances and unavailable cash balances separately.

19 The buyers suggest that unavailable -- first I  
20 think they argue in their first brief that they're basically  
21 the same cashes, available cash is the same. That's clearly  
22 not the case. Available, as we've heard Mr. Liman argue  
23 time and time again today, every word has to have some  
24 meaning. So, available has to have some meaning. It can't  
25 be the same as just cash.

1           Likewise, their argument in their supplemental  
2           brief was that unavailable cash restricted cash, but that's  
3           inconsistent with Mr. Riecker's testimony. It's also  
4           inconsistent with what Joint Exhibit 97 states, and that's  
5           the email between Rajat Prakash and the accounting team at  
6           Sears and Mr. Kamalani, where Mr. Prakash is explaining that  
7           things that are unavailable cash of the company are things  
8           such as cash in regional banks, or cash in stores.

9           THE COURT: Why would cash in regional banks not  
10          be available? I understand the general concept of  
11          restricted cash, that you can't use it for some reason --

12          MR. FRIEDMANN: Because you don't have --

13          THE COURT: -- because you're restricted from  
14          using it. But --

15          MR. FRIEDMANN: At 12 --

16          THE COURT: -- can't you use it if it's in your  
17          bank account?

18          MR. FRIEDMANN: That's the point. At 12:01 AM on  
19          February 11th, the time where you have to look at what the  
20          available cash was, our operating account had nothing in it.  
21          Everything that was in there had been swept to pay off the  
22          DIP --

23          THE COURT: But is the --

24          MR. FRIEDMANN: -- \$243,000 more than it had be.

25          THE COURT: But is the operating account the only

1 source for cash that can be used at that time?

2 MR. FRIEDMANN: That's how the company considers  
3 it. So, everything else is the money that's in regional  
4 storage -- it's cash in transit. It's not yet brought into  
5 the general operating account.

6 THE COURT: Okay. That's one category. I don't  
7 understand why you can't also use general cash in a separate  
8 bank account, unless it's a special account for payroll  
9 purposes or something like that.

10 MR. FRIEDMANN: Theoretically, I guess they could.  
11 The point is here that we had an operating account during  
12 the course of the -- during the course of us running the  
13 company as a Debtor in possession. And that operating  
14 account, at the time it was closed, was empty.

15 THE COURT: I know. But --

16 MR. FRIEDMANN: There was nothing -- we couldn't -  
17 - if we wanted to pay the DIP off more than we did, we  
18 couldn't have. It was empty at that point. If we wanted to  
19 --

20 THE COURT: Why couldn't you have -- where are the  
21 regional -- the regional banks? I don't know, it's Wells  
22 Fargo in Ashtabula. You could have called them up and say,  
23 send this money to the DIP.

24 MR. FRIEDMANN: Correct. The point is, though,  
25 the company considered those types of funds --

1 THE COURT: All right.

2 MR. FRIEDMANN: -- unavailable to us.

3 THE COURT: But in terms of actual availability,  
4 it could've been done.

5 MR. FRIEDMANN: It could have. It would've taken  
6 time --

7 THE COURT: Yeah, but it --

8 MR. FRIEDMANN: -- to get the money over there.

9 THE COURT: Well, I understand.

10 MR. FRIEDMANN: But again, that money would've  
11 then not been available. The question is, that morning,  
12 what else was available?

13 THE COURT: Well, why do we know that you couldn't  
14 have sent a wire instruction to Wells Fargo in Ashtabula to  
15 send whatever's in that account to the DIP agent?

16 MR. FRIEDMANN: My understanding is at that point,  
17 we were collecting every penny we could find everywhere in  
18 the company to try to pay down this DIP. So, there was a --  
19 in fact, it was being reported to the UCC and to eventually  
20 the buyer, showing all the efforts we were having to try to  
21 collect this money. So, whatever -- because we were trying  
22 to collect money in Israel. We were trying to get  
23 everything.

24 THE COURT: Just let me back up. There's cash in  
25 transit, there's cash in company bank accounts. Is there



1 any other cash that people are disputing that could have  
2 been arguably termed available cash on the closing date?

3 MR. FRIEDMANN: Not that they've referenced. I  
4 can tell you that the company considers to be unavailable  
5 cash any cash that was in escrow, any credit card  
6 receivables --

7 THE COURT: Right.

8 MR. FRIEDMANN: -- cash posted as collateral, you  
9 know.

10 THE COURT: Yeah. I mean, that's -- yeah.

11 MR. FRIEDMANN: So, those are --

12 THE COURT: Those are typical restricted cash  
13 exceptions to available cash.

14 MR. FRIEDMANN: Correct. And then the regional  
15 banks and the cash in stores.

16 THE COURT: All right. And the cash in stores,  
17 why isn't that tappable on the closing date?

18 MR. FRIEDMANN: It is tappable if you can get it  
19 and bring it to your account.

20 THE COURT: Well, but I'm assuming it -- you were  
21 saying it can't be?

22 MR. FRIEDMANN: Right. Well, you can't take every  
23 dollar out of the store, right? There's some amount that  
24 has to stay there because if someone comes and pays with a  
25 \$100 bill, you know, change.

1 THE COURT: I understand that.

2 MR. FRIEDMANN: So, there's some money there.

3 THE COURT: Right.

4 MR. FRIEDMANN: So, the idea was pull in as much  
5 as you could --

6 THE COURT: Okay.

7 MR. FRIEDMANN: -- while still allowing the  
8 company to operate in the ordinary course. It was another  
9 obligation we had.

10 THE COURT: Okay. Right.

11 MR. FRIEDMANN: And that was what was going on, is  
12 that --

13 THE COURT: Are there similar requirements for the  
14 bank accounts? Or did you -- just haven't looked at that  
15 yet?

16 THE COURT: Similar requirements for...? I'm  
17 sorry.

18 THE COURT: Well, I don't know if you have a need  
19 to keep bank accounts open in regional banks to run the  
20 stores, and then if there's a minimal balance? You know,  
21 things like that.

22 MR. FRIEDMANN: My understanding is that they do,  
23 and that was a lot of the whole cash management system that  
24 we handed over to Transform at the close.

25 THE COURT: Okay.

1 MR. FRIEDMANN: Which gets us into our other  
2 issue.

3 THE COURT: Okay. Were there any cash equivalents  
4 that were available at that time? I guess not. You can't  
5 really pay down a DIP with a cash equivalent.

6 MR. FRIEDMANN: That's the thing. It was being  
7 measured as actual dollars in an account that if you go to  
8 pay off something.

9 THE COURT: Well, is there any -- was there any  
10 cash equivalent? No one's argued that there were any cash  
11 equivalents.

12 MR. FRIEDMANN: Not that I'm aware of, no.

13 THE COURT: Okay. Okay.

14 MR. LIMAN: Your Honor, a few points. First of  
15 all, it just is not true that every available dollar was  
16 taken to pay down the DIP. There was, for example, \$11  
17 million that they got through a credit card settlement that  
18 they took into a reserve account and did not use to pay the  
19 DIP.

20 THE COURT: But --

21 MR. LIMAN: We're not -- this dispute doesn't turn  
22 on that, but it's just not the case.

23 THE COURT: But that was -- that had to be kept in  
24 reserve, right?

25 MR. LIMAN: That was put in a reserve account.

1 THE COURT: Under those agreements? So, that  
2 would be restricted cash.

3 MR. LIMAN: You know, I don't know the answer to  
4 that. But let me address the interpretation of available  
5 cash, because I think here is one where the rules that Your  
6 Honor just enunciated with respect to 2.3(k) favors us.

7 They made a loud noise about Mr. Riecker's  
8 testimony. And there's both law and testimony with respect  
9 to this. I mean, of course, contract law says that when you  
10 have an undefined term and there is a consistent, unvarying  
11 interpretation given by both parties to certain language,  
12 that language is deemed to be interpreted.

13 We don't disagree with that proposition. But  
14 that's the standard that you have to measure their testimony  
15 against. And if you look at the testimony of Mr. Riecker,  
16 what he says on Page 51, Line 23, is, "Unavailable cash is  
17 not tracked by the accounting system. The accounting system  
18 does not define unavailable cash. QUESTION: So, where is  
19 unavailable cash tracked? ANSWER:" -- and he's referring  
20 to this (indiscernible) November email -- "Unavailable cash  
21 is only tracked on this. QUESTION:" --

22 THE COURT: I'm sorry -- on this?

23 MR. LIMAN: Meaning a single email.

24 THE COURT: Okay.

25 MR. LIMAN: Single email.

1 THE COURT: All right.

2 MR. LIMAN: And then he says -- and then he goes  
3 on, based on what they think is unavailable cash at that  
4 time. So, I just don't think that their reference to Mr.  
5 Riecker solves the problem for Your Honor.

6 THE COURT: Okay.

7 MR. LIMAN: It just doesn't solve the problem. I  
8 think one has to resort to questions about what is the  
9 purpose of putting in the available cash, giving contracts  
10 sensible meanings.

11 Now, this is one where if what they were trying to  
12 do is to say that it was available cash to pay down the DIP,  
13 or cash that was available in their operating accounts,  
14 those would have been very easy words to add. Same rules  
15 that, you know, we've been applying all day. Those would  
16 have been very easy words to add.

17 That would not have been agreeable to my client  
18 for an important reason. And that takes you to the question  
19 of how you interpret this and what's the purpose of this  
20 provision. I don't think that there's any dispute that the  
21 purpose of this provision is to respond on the accelerated  
22 basis that this deal was negotiated on to the Debtors'  
23 representation that they would not have any money left after  
24 paying down the DIP to \$1.2 billion. And therefore, we  
25 needed to take on that amount of the liabilities.

1 And as I referenced in my --

2 THE COURT: Well, except it doesn't say that  
3 either. It says net of available cash. And available cash  
4 has a pretty well understood meaning.

5 MR. LIMAN: It does, Your Honor. In every case  
6 that I've been involved in, and I assume that many of the  
7 cases that you've seen in this courtroom have distinguished  
8 between cash that is available to pay off general  
9 obligations, and cash that is restricted. It's in locked  
10 boxes, it's in segregated accounts. It's dedicated for a  
11 particular purposes. It can't be used for general purposes.

12 Every case that I've been involved in, that's been  
13 the concept of available cash versus restricted cash.

14 THE COURT: Right.

15 MR. LIMAN: It is the common understanding of what  
16 is available cash. It is the interpretation that makes  
17 sense in this circumstance, because if it's not the  
18 interpretation, then imagine what the incentives are.

19 I mean, they say that they paid every penny. We  
20 say that they didn't. They said they paid every penny  
21 because the other stuff was in transit, but --

22 THE COURT: Well --

23 MR. LIMAN: -- another way of putting what they're  
24 saying is that their only incentive was to get as much cash  
25 out of what's in transit in order to pay down the DIP, keep

1 whatever is in the other --

2 THE COURT: But that's not what's alleged.

3 MR. LIMAN: It's --

4 THE COURT: It isn't alleged that they manipulated  
5 their cash.

6 MR. LIMAN: It's not alleged, but -- and to be  
7 clear, I'm not alleging bad faith on their part. I am --

8 THE COURT: I know. But there is an ordinary  
9 course obligation here. It's tempered by, you know,  
10 discussions with management. But it seems to me that  
11 available cash doesn't just entail an operating account, one  
12 operating account. It's cash that is available as of the  
13 closing date to, you know --

14 MR. LIMAN: But that's the question.

15 THE COURT: -- and so that would include, I think,  
16 money in bank accounts that are not special purpose  
17 restricted accounts. Not just the operating account, but  
18 you know, the Wells Fargo bank in Alabama, or whatever.

19 As far as cash in the stores, I don't know if  
20 you're even arguing about that.

21 MR. LIMAN: Yeah, we are --

22 THE COURT: I think you're arguing about cash in  
23 transit, right?

24 MR. LIMAN: We're arguing that there -- about cash  
25 in transit.

1 THE COURT: All right.

2 MR. LIMAN: I think most of this was cash in  
3 transit.

4 THE COURT: All right. So, I don't think it's  
5 cash in the stores. I think the only issue is cash in  
6 transit.

7 MR. LIMAN: And the proposition we're arguing is  
8 essentially that that would give them a windfall.

9 THE COURT: But how is that available?

10 MR. LIMAN: Because every one of the obligations  
11 that they would have us take on, they could use that cash  
12 for. I resort again to the common definition of available  
13 cash. It doesn't mean --

14 THE COURT: Well, let me just take a look at --  
15 the aggregate DIP shall mean as of the closing date, an  
16 amount equal to \$1.2 billion, less the aggregate amount  
17 required to be paid, net of any available cash, to fully  
18 satisfy the existing indebtedness.

19 So, I think this is as of the closing date, right?

20 MR. LIMAN: It is as of the closing date. And if  
21 they have cash that was in restricted accounts, then that's  
22 fine, but if --

23 THE COURT: But if it's in transit, is it really  
24 available to pay?

25 MR. LIMAN: Yes, I think it is.



1 THE COURT: Could they have said to the DIP agent,  
2 wait until tomorrow?

3 MR. LIMAN: I think they could have said he got  
4 cash that is in transit, we'll give that to you. I don't  
5 know --

6 THE COURT: So, you're saying that's a cash  
7 equivalent?

8 MR. LIMAN: I don't know whether the --

9 THE COURT: I mean cash does --

10 MR. LIMAN: I --

11 THE COURT: Available cash includes cash  
12 equivalents.

13 MR. LIMAN: I don't know that they would be able  
14 to -- it does include cash equivalents. I don't know that  
15 they would be able to say that to the DIP agent. And  
16 that's, to be clear, not my argument.

17 THE COURT: Okay

18 MR. LIMAN: My argument is that available cash  
19 means cash that is not restricted to other purposes. And  
20 the reason why you have to give it that interpretation is  
21 because of the purpose of this clause to protect against the  
22 claim that they would have excess money. And my point about  
23 the manipulation was not that they actually manipulated. I  
24 don't think that they actually did manipulate, Your Honor.

25 THE COURT: Right.

1 MR. LIMAN: Because I think they had the same  
2 understanding of this provision that we did. That's the  
3 reason why I think if you're adopting an interpretation that  
4 says the parties used the notion available cash, not just  
5 for this case, but frankly, for every other case, what  
6 you're going to be doing is establishing a rule that gives  
7 the parties an incentive to keep money in one place where it  
8 wouldn't be accessible as of the closing date and not on  
9 another. And that's just not fair.

10 THE COURT: But if it's just cash in transit,  
11 they're not doing it. They're not putting their thumb on  
12 that. That's just in transit.

13 MR. LIMAN: But Your Honor, that's kind of not my  
14 point.

15 THE COURT: I mean, there's no incentive, in other  
16 words.

17 MR. LIMAN: That's my point. That's my point.

18 THE COURT: No, I'm saying they don't have an  
19 incentive, because they --

20 MR. LIMAN: Sure, they do.

21 THE COURT: But there's --

22 MR. LIMAN: Sure --

23 THE COURT: They're not doing anything. It's just  
24 in transmit.

25 MR. LIMAN: Absolutely, they would have an

1 incentive.

2 THE COURT: Well, where was the cash before?

3 MR. LIMAN: The cash, I think, was in stores  
4 before. And they --

5 THE COURT: In the stores?

6 MR. LIMAN: Yeah. And they absolutely would have  
7 an incentive if the -- if this read cash in the operating  
8 accounts, or cash that could be sent immediately to satisfy  
9 the DIP, they absolutely 100 percent would have --

10 THE COURT: No, but that's where the ordinary  
11 course aspect comes in. This isn't in terms of payables,  
12 the six-day payable practice. This is if they told their  
13 stores, delay paying us until February 15th after the  
14 closing, then you guys win.

15 MR. LIMAN: Your Honor, there's a reason why the  
16 ordinary course covenant doesn't do it and it didn't do it  
17 in the drafting of it.

18 THE COURT: Okay. Why is that?

19 MR. LIMAN: Because the ordinary course covenants  
20 requires, frankly, Your Honor, just establish when you're  
21 talking about ordinary course requires proof, it requires  
22 people to take testimony, to take evidence and --

23 THE COURT: Right.

24 MR. LIMAN: -- and the like.

25 THE COURT: So, if you have all of those people --

1 MR. LIMAN: But, no, I mean -- but, Your Honor,  
2 that's not right.

3 THE COURT: I mean, who would have sent out that  
4 message?

5 MR. LIMAN: That's not right.

6 THE COURT: No?

7 MR. LIMAN: When parties draft contracts, they  
8 rely on the ordinary course covenant as a default provision  
9 --

10 THE COURT: I'm sorry to interrupt you, but in  
11 terms of the proof issue, that might generally be the case,  
12 but wouldn't it be someone at the top that would have  
13 instructed the stores to delay the payment?

14 MR. LIMAN: I don't know, Your Honor. It could be  
15 somebody at the top. It could be somebody who thinks, gee,  
16 this is a good deal. I mean, most of my practice, Your  
17 Honor, is in the white-collar area. I don't appear on --

18 THE COURT: I don't know --

19 MR. LIMAN: And I have --

20 THE COURT: -- if the cashier or the treasurer of,  
21 you know, the Sears down the street in White Plains would  
22 have thought about this.

23 MR. LIMAN: Your Honor, again, that's my -- my  
24 argument is not that they were permitted to act outside the  
25 ordinary course. My argument is that if you try to give

1 this a sensible interpretation, the question is where do you  
2 divide the line? Do you divide it operating versus regional  
3 accounts? Divide it regional accounts versus cash in  
4 transit? Divide it cash in transit versus stores? And  
5 what's the neutral principle?

6 THE COURT: I'm tilted about 50/50 on cash in  
7 transmit.

8 MR. LIMAN:

9 THE COURT: And I think that perhaps the ordinary  
10 course tilted in your favor and otherwise -- I mean, it's  
11 not really available for the transaction, right? It's not  
12 available to pay the banks.

13 MR. LIMAN: It may not be available for that part  
14 of the transaction, but the purpose of this provision was to  
15 provide a -- it was a proxy for doing due diligence on the  
16 representation of how much cash they had.

17 THE COURT: That's fine.

18 MR. LIMAN: And if it's to serve as a proxy, then  
19 the function has to -- the dividing line is the neutral  
20 principle has to be one that says is this deducted to other  
21 purposes. It can't be --

22 THE COURT: See, I'm not so sure of that.

23 MR. LIMAN: It can't be the speed at which it's  
24 available, because otherwise, Your Honor, it would create  
25 the kinds of incentives that those would be policed by the

1 ordinary course covenants.

2 THE COURT: Right.

3 MR. LIMAN: But that's cold comfort to a client in  
4 my client's position, who would in that instance have to  
5 figure out that they were acting outside of the ordinary  
6 course.

7 THE COURT: Normally, that's the case. But you  
8 have the former CEO, I think you have the former CFO, you  
9 have all of -- you know?

10 MR. LIMAN: You put your finger on it by saying,  
11 normally that's the case. And when you interpret the  
12 contract, that's the (indiscernible) reply.

13 THE COURT: I guess -- let me ask you a different  
14 question, which is, is there parol evidence on this point on  
15 defining net available cash?

16 MR. LIMAN: There is.

17 THE COURT: There is?

18 MR. LIMAN: Yes. We didn't offer it, but there --

19 THE COURT: No, I understand.

20 MR. LIMAN: There absolutely is.

21 MR. SCHROCK: Judge, just because the hour is  
22 late, I just wanted to... There is store cash they're  
23 purchasing store cash, and that's a defined term. So --

24 THE COURT: Well, they get that anyway.

25 MR. SCHROCK: Right, they get that anyway. So, at

1 this point (indiscernible) who has an incentive, you know,  
2 listen, they're purchasing it. So, obviously we can't -- I  
3 know we can't pay off a DIP credit facility, and I would  
4 hope the parties would stipulate the cash that's in transit  
5 and by definition not available on the closing date, we  
6 don't have an ability to --

7 MR. LIMAN: Your Honor --

8 MR. SCHROCK: -- to get that cash.

9 MR. LIMAN: -- Mr. Schrock, I think, actually has  
10 just made our point, which is that if there is cash, they're  
11 creating the incentive to --

12 THE COURT: No, but if your client gets that cash  
13 --

14 MR. LIMAN: It doesn't get it if it's not -- if  
15 it's between the store and the operating accounts.

16 THE COURT: I thought --

17 MR. LIMAN: I don't think he said that, Your Honor  
18 (indiscernible) --

19 THE COURT: I thought you said this very cash  
20 would be store cash.

21 MR. SCHROCK: The cash that's in the stores is  
22 being --

23 THE COURT: But this is in the ether, right?

24 MR. SCHROCK: Right.

25 THE COURT: This is in transit?

1 MR. SCHROCK: Right.

2 THE COURT: So, who gets that?

3 MR. SCHROCK: My point was when we were talking  
4 about, you know, parties keeping things in the store.  
5 They're going to be purchasing the cash --

6 THE COURT: Right. But it's not like -- I thought  
7 you were saying that Transform has its cake and is eating it  
8 too. That's not really the case.

9 MR. SCHROCK: I mean, what's --

10 THE COURT: You know what? I actually think this  
11 is an ambiguous term.

12 MR. SCHROCK: Okay.

13 THE COURT: It's a term that does have a general  
14 meaning.

15 MR. SCHROCK: Right.

16 THE COURT: But the parties may well have meant  
17 something specific here. Normally, it's a defined term.  
18 So, I think I should have parol evidence on this, what they  
19 meant by this parenthetical. I think we understand that  
20 it's as of the closing date. I think we understand it's not  
21 restricted.

22 I think we're really limiting this to cash in  
23 transit, and everything else is not available cash, other  
24 than money that's in a bank account that could be used to  
25 make the payment on the closing, you know, i.e. not a



1 payroll account, not a special purpose tax account, or an  
2 escrow account, or anything like that. Okay.

3 MR. LIMAN: How would you like to handle the  
4 remaining -- they're small issues --

5 THE COURT: Well, I mean, we have that issue and  
6 we have -- I think the only -- oh, the adequate assurance,  
7 the EDA, and the mechanics liens. I will give you my  
8 preliminary ruling without any explication of it on each of  
9 these.

10 MR. LIMAN: Do we each get a chance to argue the -  
11 -

12 THE COURT: You'll get a chance to then decide  
13 what you want to do, whether you want to continue to argue  
14 these.

15 I think under the plain language of the document,  
16 the adequate assurance deposits go to the buyer. There may  
17 be aspects related to that that fit into other formulas.  
18 But they're a deposit. And they're not specifically carved  
19 out, and there's no ordinary course exception, or out of the  
20 ordinary course exception for the deposit.

21 I believe the EDA rights belong to the Debtor  
22 under the specific language, which I frankly don't see how  
23 you could really write it any more specific than the  
24 applicable provisions that has the refund rebate, refers to  
25 the taxes, et cetera. I think that's clear and I think it

1 supersedes the general language of the claim.

2 As far as mechanics liens are concerned, I'm more  
3 open to hearing argument on this, but I believe that that  
4 issue, if we're talking about mechanics liens that arose  
5 pre-closing, I think those are the Debtors' responsibility.

6 Again, you all should discuss what you want to do  
7 with those three issues and the parol evidence on available  
8 cash and see where you want to go. But as far as all the  
9 other issues are concerned, you know, I guess I'll look for  
10 an order. Unless you want to have it all wrapped up so that  
11 there's no issues about an interlocutory order.

12 I think you're back here -- I know, you should  
13 talk to Ms. Lee. You could conceivably be back here in a  
14 week or so. I think she had like July 20th free for  
15 something. I'm not sure, frankly.

16 MR. SCHROCK: We have a hearing on the 23rd --

17 THE COURT: 23rd, that's it.

18 MR. SCHROCK: -- for the 507(b) issues, but I know  
19 we were talking about having another day if we had to break  
20 apart this hearing.

21 THE COURT: So, talk with her about timing on  
22 that.

23 MR. SCHROCK: Okay.

24 THE COURT: If we could resolve all of this in a  
25 matter of, you know, a couple of weeks, there's no reason to

1 have two orders.

2 MR. SCHROCK: Yeah.

3 THE COURT: We should just have one order on  
4 everything.

5 MR. SCHROCK: That works, Judge. Thank you.  
6 Thank you very much. Thanks for staying late.

7 THE COURT: Well, I must say, we packed a lot into  
8 one day.

9 MR. SCHROCK: The stamina is always as impressive,  
10 Your Honor.

11 THE COURT: That reflects the quality of the  
12 lawyers.

13 (Whereupon these proceedings were concluded at  
14 6:53 PM)

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I N D E X

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for a Rule 2004 Granted

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing  
transcript is a true and accurate record of the proceedings.

Sonya Ledanski  
Hyde

Digitally signed by Sonya Ledanski Hyde  
DN: cn=Sonya Ledanski Hyde, o, ou,  
email=digital@veritext.com, c=US  
Date: 2019.08.09 14:26:58 -04'00'

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: July 22, 2019

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